Supreme Court, U.S.
FILED

No. 03-952 DEC 23 2003

In The

Supreme Court of the United States

BEVERLY M. BRAZAUSKAS,

Petitioner,

v.

FORT WAYNE-SOUTH BEND DIOCESE, INC.
SACRED HEART PARISH, AND JOSE MARTELLI,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Indiana

PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. TERRELL
LANDMAN & BEATTY
1150 Market Square Center
151 North Delaware Street
Post Office Box 44953
Indianapolis, IN 46244-0953
(317) 236-1040

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the hybrid exception recognized in *Employment Division v. Smith* exempt a religious entity from civil liability for "any communicative activity," where the conduct would otherwise violate a state's neutral and generally applicable statutes prohibiting blacklisting.

2. Does the church autonomy doctrine under the First Amendment's Free Exercise Clause and Establishment Clause preclude a religious entity from being held liable for interfering in a former employee's attempt to obtain employment as an administrator at a church-sponsored university, where such conduct otherwise would violate a state's neutral and generally applicable statutes prohibiting blacklisting.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceedings in the court below:

Beverly M. Brazauskas, an individual living and working in South Bend, Indiana; Fort Wayne-South Bend Diocese, Inc., a Diocese of the Roman Catholic Church incorporated in the State of Indiana, and covering a geographical area in northern Indiana; Sacred Heart Parish, a parish within the Fort Wayne-South Bend Diocese located in Notre Dame, Indiana; Jose Martelli, an individual and former priest of Sacred Heart Parish.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
A. Fact factual Background	3
B. Lower Court Proceedings	5
C. The Federal Constitutional Issues Were Raised And Ruled On Below	6
REASONS FOR GRANTING THE PETITION	9
A. Hybrid Exception to Neutral Laws of General Applicability	10
1. Refusal to Recognize Hybrid Exception	12
2. Independently Viable Claim Theory	14
3. Colorable Claim Approach	15
4. Indiana Supreme Court Decision Was Incorrect Under Any Interpretation of the Hybrid Exception	17
B. Church Autonomy Doctrine	18
1. Development of the Church Autonomy Doctrine	19
2. Does Church Autonomy Doctrine Survive *Smith*?	23

TABLE OF CONTENTS – Continued

Page

3. Even If the Church Autonomy Doctrine Survived *Smith*, It Is Not Applicable to Communication in Violation of Blacklisting Statutes 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (U.S. 1997) 26

Ayon v. Gourley, 47 F.Supp.2d 1246 (1998) 27

Board of Education v. Grumet, 512 U.S. 687 (1994).....22

Brazauskas v. Fort Wayne-South Bend Diocese, 796 N.E.2d 286 (2003)..... 2

Brazauskas v. Fort Wayne-South Bend Diocese, 755 N.E.2d 201 (2002)..... 2

Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995).....14

Bryce v. Episcopal Church, 289 F.3d 648 (10th Cir. 2002).....23, 25

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).....13, 16

Combs v. Central Texas Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999).....23

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).....22

County of Allegheny v. ACLU, 492 U.S. 573 (1989).....22

Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994) 27

DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993).....25

EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996).....14, 23

EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982).....25

TABLE OF AUTHORITIES – Continued

Page

Employment Division v. Smith, 494 U.S. 872 (1990) ...*passim*

Gibson v. Brewer, 952 S.W. 2d 239 (Mo. 1997).....27

Gonzalez v. Roman Catholic Archbishop of Manila, 180 U.S. 1 (1929).....20

Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952).....19, 24

Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993).....12

Knight v. Connecticut Department of Public Health, 275 F.3d 156 (2d Cir. 2001).....13

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993).....21

Lemon v. Kurtzman, 403 U.S. 602 (1971).....21, 22, 23

Lynch v. Donnelly, 465 U.S. 668 (1984).....22

Mitchell v. Helms, 530 U.S. 793 (2000).....22

Malicki v. Doe, 814 So.2d 347 (Fla. 2002).....27

McKelvey v. Pierce, 173 N.J. 26, 800 A.2d 840 (2002).....27

Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).....26

Serbian Eastern Orthodox Diocese of America and Canada v. Milivojevich, 426 U.S. 696 (1976).....20

Swanson v. Guthrie Independent School District, 135 F.3d 694 (10th Cir. 1998).....15, 23

Teadt v. Lutheran Church Missouri Synod, 237 Mich. App. 567, 603 N.W.2d 816 (1999).....27

TABLE OF AUTHORITIES – Continued

Page

Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999), *rev'd on other grounds, en banc*, 220 F.3d 1134 (9th Cir. 2000) 15

Walker v. Jaffree, 472 U.S. 38 (1985).....21

Watson v. Jones, 80 U.S. 679 (1871) 19

Welter v. Seton Hall University, 608 A.2d 206 (N.J. 1992).....25

CONSTITUTIONS AND STATUTES

First Amendment, Constitution of the United States.....*passim*

Fourteenth Amendment, Constitution of the United States..... 2

Indiana Code § 22-5-3-1 (1993).....3, 5

Indiana Code § 22-5-3-2 (1993)..... 3

28 U.S.C. § 1257 (2003)..... 2

OTHER AUTHORITIES

Investigative Staff of the Boston Globe, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2002) 26

Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981) 19

Johanna McGeary, *Can the Catholic Church Save Itself*, TIME MAGAZINE, April 1, 2002.....26

TABLE OF AUTHORITIES – Continued

Page

Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269 (1998).....24

Pope John Paul II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE OF THE SUPREME PONTIFF (St. Paul Books & Media, 1991).....5, 7, 18, 25

PETITION FOR WRIT OF CERTIORARI

Petitioner Beverly M. Brazauskas respectfully requests that a Writ of Certiorari be issued to review the judgment of the Indiana Supreme Court. Contrary to the Constitution of the United States and this Court's pronouncements in the case of *Employment Division v. Smith*,[1] the Indiana Supreme Court held that religious entities are immune from liability under Indiana's blacklisting statutes, which are neutral laws of general applicability, because the conduct at issue involved "communicative activity." Further, in contravention of the Constitution of the United States and this Court's decision in *Employment Division v. Smith,* the Indiana Supreme Court held that religious entities may not be held liable for otherwise illegal blacklisting in violation of a state's neutral law of general applicability because of the protection provided by the church autonomy doctrine under the First Amendment of the Constitution of the United States.

The relationship between Church and State is fundamental to the most basic protections of our Constitution. Likewise fundamental is the applicability of laws to all citizens, even those whose actions are religiously motivated. These issues are of utmost constitutional importance. Conflicts exist among the various federal circuits, as well as state courts, as to whether and to what extent the First Amendment immunizes religious entities from the application of neutral laws of general applicability. This Court should clarify and resolve these conflicts.

---

[1] 494 U.S. 872 (1990).

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 796 N.E.2d 286. The opinion of the Indiana Court of Appeals, which was vacated by the Indiana Supreme Court decision, is reported at 755 N.E.2d 201. The trial court judgment of the St. Joseph Superior Court No. 7, the Honorable Michael D. Cook, Special Judge, is not reported but is included in the Appendix. (App. 32.)

JURISDICTION

The opinion of the Indiana Supreme Court was entered on September 25, 2003, affirming dismissal of Petitioner's claim on the basis that it was precluded by the First Amendment of the Constitution of the United States. (App. 14.) The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the Constitution of the United States provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Indiana Code § 22-5-3-1 (1993) states:

> A person, who, after having discharged any employee from his service, prevents the discharged employee from obtaining employment with any other person commits a Class C infraction, and is liable in penal damages to the discharged employee, to be recovered by civil action; but this section does not prohibit a person from informing, in writing, any other person to whom the discharged employee has applied for employment, a truthful statement of the reasons for the discharge.

Indiana Code § 22-5-3-2 (1993) states:

> If any railway company or any other company or partnership or corporation in this state shall authorize, allow or permit any of its or their agents to black-list any discharged employees, or attempt by words or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left said company's service, from obtaining employment with any other person, or company, said company shall be liable to such employee in such sum as will fully compensate him, to which may be added exemplary damages.

STATEMENT OF THE CASE

A. Factual Background

Between 1987 and 1992, Petitioner Beverly M. Brazauskas was employed as Director of Religious Education and Liturgy at Sacred Heart Parish in South Bend, Indiana, serving under Father William Simmons. In the

summer of 1992, Father Jose Martelli was appointed as Pastor of Sacred Heart Parish replacing Father Simmons. On August 7, 1992, four days after Ms. Brazauskas returned from her vacation, Father Martelli fired her. Soon thereafter, Ms. Brazauskas instituted a lawsuit against the Diocese, Sacred Heart and Martelli for breach of contract and other related claims relating to her discharge.[2]

In the spring of 1993, Ms. Brazauskas was still seeking employment and applied for the position of Director of the Program For Church Leaders, a sabbatical program at the University of Notre Dame located in South Bend. The University of Notre Dame is an Indiana not-for-profit corporation separate and distinct from the Diocese.

A university search committee unanimously recommended hiring Ms. Brazauskas for the position. That recommendation was forwarded in writing to University Provost Timothy O'Meara. Provost O'Meara approached University President Malloy in two separate meetings, advising him of the results of the search committee and recommending the hiring of Ms. Brazauskas. In each of those meetings, President Malloy refused to hire Ms. Brazauskas, stating in each that he would not hire her because she was suing the Diocese. The University President had never previously rejected a similar recommendation for appointment. President Malloy admitted that the stated policy was unwritten, had never been communicated to the Notre Dame community, and had never been communicated to the Notre Dame Board of Trustees.

---

[2] These claims were resolved in a prior appeal and are no longer at issue.

During this time period, Francis Castellino, Dean of the College of Sciences for the University of Notre Dame, had a conversation with Richard P. McBrien, a professor and member of the University Senate at Notre Dame. Dean Castellino told McBrien that the reason Ms. Brazauskas was not hired was due to interference by Bishop John D'Arcy of the Fort Wayne-South Bend Diocese, who was offended by Ms. Brazauskas' lawsuit against the Diocese.

Upon learning this information, Ms. Brazauskas amended her complaint, asserting that the Fort Wayne-South Bend Diocese had interfered with her attempts to obtain employment at Notre Dame in violation of Indiana's blacklisting statutes, codified at Indiana Code (1993) §§ 22-5-3-1, -2. She sought compensatory and punitive damages allowed by the blacklisting statutes.

B. Lower Court Proceedings

The Diocese filed a Motion to Dismiss asserting that it was immune from application of Indiana's blacklisting statutes pursuant to the First Amendment of the United States Constitution. The Diocese based its argument on its assertion that any communication between the Diocese and the university regarding Ms. Brazaukas' employment was pursuant to a 1991 directive from Pope John Paul II titled *Ex Corde Ecclesiae*.[3] This directive encourages "close personal and pastoral relationship between university and

[3] Pope John Paul II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE OF THE SUPREME PONTIFF (St. Paul Books & Media, 1991).

Church authorities characterized by mutual trust, close and consistent cooperation and continuing dialogue."[4]

The trial court dismissed Ms. Brazauskas' claims. (App. 32.) The Indiana Court of Appeals affirmed. (See App. 19.)

The Indiana Supreme Court granted Ms. Brazauskas' Petition for Transfer, and vacated the decision of the Indiana Court of Appeals.[5] On September 25, 2003, the Indiana Supreme Court issued its opinion (Sullivan, J. concurring and dissenting) affirming dismissal of Ms. Brazauskas' claims under the First Amendment of the United States Constitution. The Indiana Supreme Court opinion expressly noted that no state constitutional issues had been raised, and consequently the decision was not based upon state constitutional grounds. (App. 10, n. 4.)

C. The Federal Constitutional Issues Were Raised And Ruled On Below

The issues presented by this Petition have been at the crux of this lawsuit at each stage of the proceedings. The issues were first raised in state trial court where the Diocese moved to dismiss Petitioner's Complaint for Blacklisting and Tortious Interference on the basis that the First Amendment to the United States Constitution precluded the trial court from exercising jurisdiction over this matter. On February 7, 2001, the trial court granted

---

[4] See App. 3.

[5] 774 N.E.2d 514 (Ind. 2002) (Table).

the Diocese's motion and dismissed Petitioner's Complaint. (App. 32.)

Petitioner appealed to the Indiana Court of Appeals specifically raising the argument that the trial court's decision was contrary to the First Amendment of the Constitution. The Court of Appeals rejected Petitioner's arguments and affirmed the trial court. (App. 31.)

The issues were again expressly raised and decided by the Indiana Supreme Court. In its opinion, the Indiana Supreme Court specifically noted:

> The Diocese defendants successfully argued to the trial court and the Court of Appeals that they lack jurisdiction because secular review of Brazauskas' claims would constitute excessive entanglement and violate the Free Exercise clause of the First Amendment of the U.S. Constitution, which is applicable to the states through the Fourteenth Amendment.

(App. 9.)

The Court noted that *Ex Corde Ecclesiae*, a 1991 directive of Pope John Paul II, instructs Catholic universities and local Catholic diocese officials to cooperate and communicate closely and that keeping the university appraised of diocesan developments, including pending lawsuits, "would therefore be acting in accordance with ecclesiastical directive." (App. 11.) The Court then held that the challenged activity of "blacklisting" was "communicative" and therefore fell within the hybrid exception noted in *Smith* for a free exercise claim connected with a communicative activity. (App. 11.)

The Indiana Supreme Court further found that the First Amendment right of a church to make decisions regarding its own internal affairs – the "church autonomy doctrine" – was not impacted by the Supreme Court's decision in *Employment Division v. Smith*. (App. 12.) The Court held that the First Amendment precluded applying the blacklisting statutes to communication and coordination among church and university officials, so long as that communication "did not culminate in any illegal act." (App. 13.)[6]

Justice Sullivan dissented from the majority's treatment of the hybrid issue, pointing out that *Smith* "does not establish an exception from *Smith's* general rule for all communicative activity." (App. 15.) Rather, Justice Sullivan found that the communicative activity must be such that it is protected by constitutional provisions other than the Free Exercise Clause, and that the purported blacklisting communication did not meet that standard.

Justice Sullivan also dissented regarding the church autonomy doctrine, finding its continued vitality "hard to reconcile" with the *Smith* decision. (App. 17.) Justice Sullivan wrote that even if the church autonomy defense survived *Smith,* it could not be used in this case to bar a claim involving a non-ministerial position that could be

---

[6] Pursuant to directions from the Indiana Court of Appeals in an earlier appeal in this matter, the issues raised in this appeal initially were raised pursuant to a Motion to Dismiss. The Indiana Supreme Court determined that this was the incorrect procedure, and instead addressed this matter as a Motion for Summary Judgment. (App. 4-5.) The resolution of these procedural issues has no impact upon the issues raised in this Petition.

resolved by application of neutral principles of law applied in a secular fashion. (App. 17.)

The federal constitutional issues under the First Amendment to the Constitution of the United States have been raised at every step of the proceedings in this matter, and have been the basis of each court's decision in this case.

REASONS FOR GRANTING THE PETITION

The relationship between Church and State under the First Amendment is one of the most critical under our constitutional system. The landmark decision of *Employment Division v. Smith*[7] established a fundamental principle that neutral laws of general applicability are to be applied to all regardless of religious motive or belief. Nevertheless, two fundamental areas under the *Smith* decision remain unresolved: (1) the scope of the hybrid exception referred to by Justice Scalia where a Free Exercise claim is conjoined with a second constitutional claim; and (2) whether the church autonomy doctrine continues to exist post-*Smith*, and if so the extent to which it acts as an exception to the general applicability of neutral laws.

Federal circuit courts are significantly divided in their interpretation and application of the hybrid exception announced in *Smith*. At least three separate views have

[7] 494 U.S. 872 (1990).

emerged from the federal circuit courts, including the view that the hybrid exception does not exist.

Likewise, the post-*Smith* place of the church autonomy doctrine requires clarification and direction. Courts continue to apply the church autonomy doctrine with conflicting results which need the certainty provided by an opinion from this Court.

Both issues are raised in this case.

While the issue of the relationship of Church and State under our Constitution has always been important, matters have occurred since the decision in *Smith* that make it even more imperative that this Court clarify these principles. Repeated instances of child abuse by clergy, actions by church officials to conceal child abuse under the guise of internal transfers, and church policies to treat complaints of child abuse as internal matters all have raised issues regarding the relationship between Church and State to public prominence and importance. The same constitutional issues which exist in those cases are present in this case, but in the less volatile circumstance of a blacklisting claim.

An important national interest is served by resolution of these issues and providing direction to divided lower courts with regard to the proper application of the hybrid exception and the church autonomy doctrine.

A. Hybrid Exception to Neutral Laws of General Applicability

The Indiana Supreme Court erroneously held that a Free Exercise claim connected with *any* communicative activity is sufficient to bring the matter within the hybrid

exception identified by Justice Scalia in *Employment Division v. Smith.* As pointed out by Justice Sullivan's dissenting opinion in the Indiana Supreme Court, this is simply not consistent with the *Smith* decision. (App. 16).

In *Employment Division v. Smith,* claimants appealed denial of their unemployment compensation benefits based upon a determination that their religious use of peyote was illegal and misconduct justifying termination. Affirming denial of benefits, this Court stated: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[8]

This Court's majority opinion went on to note that an exception existed only for "hybrid" cases that involved the protection of some additional constitutional right in addition to the Free Exercise Clause. Specifically, the Court stated:

> The only decisions in which we have held that the First Amendment bars application of a neutral generally applicable law to religious motivated action have involved not only the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press. . . .[9]

---

[8] 494 U.S. at 878-79.

[9] *Id.* at 881.

The Indiana Supreme Court opinion interpreted the hybrid exception to apply any time the prescribed activity involves communication – in this case blacklisting intended to prevent Ms. Brazauskas from obtaining employment. As Justice Sullivan's dissenting opinion pointed out, the hybrid exception cannot be so expansively applied. (App. 16).

Federal circuit courts are divided on the existence and meaning of the hybrid exception and the nature of the companion constitutional claim necessary in order to invoke the hybrid exception.

1. Refusal to Recognize Hybrid Exception.

Both the Second Circuit and the Sixth Circuit have refused to recognize the hybrid exception. In *Kissinger v. Board of Trustees*,[10] the Sixth Circuit considered the claim of an Ohio State University student who objected to taking certain classes to fulfill her surgical requirement for her veterinary degree. Her refusal was based on her religious beliefs as well as freedom of speech and freedom of association.[11] Rejecting the hybrid exception, the Sixth Circuit stated:

> We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights. . . . [T]he *Smith* court did not explain how the standards under the

[10] 5 F.3d 177 (6th Cir. 1993).

[11] *Id.* at 179.

> Free Exercise Clause would change depending on whether other constitutional rights are implicated. . . . Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.[12]

Likewise, the Second Circuit in *Knight v. Connecticut Department of Public Health*[13] announced that the hybrid exception set forth in *Smith* was non-binding dicta.[14] In *Knight,* the Second Circuit recognized the split among federal circuits regarding the possibility and applicability of hybrid claims. The Second Circuit upheld a prohibition against state employees discussing their religious beliefs with clients while performing their duties. The court stated that it need not determine whether hybrid claims required greater governmental scrutiny in reaching its decision. Nevertheless, the Second Circuit observed: "The allegation that a state action that regulates public conduct infringes more than one of a public employee's constitutional rights does not warrant more heightened scrutiny than each claim would warrant when viewed separately."[15]

---

[12] *Id.* at 180. In reaching this conclusion, the Sixth Circuit relied in part upon Justice Souter's concurrence in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 559 (1993), in which Justice Souter characterized the hybrid exception as "ultimately untenable."

[13] 275 F.3d 156 (2d Cir. 2001).

[14] 275 F.3d at 167.

[15] *Id.*

2. Independently Viable Claim Theory.

Both the First Circuit and the D.C. Circuit have held that the hybrid rights exception in *Smith* is triggered only by an independently viable constitutional claim. This requires that the conjoined claim be one which could stand on its own absent a Free Exercise Claim.

In *Brown v. Hot, Sexy and Safer Productions, Inc.*,[16] high school students and their parents challenged the students' mandatory attendance at a sexually explicit AIDS awareness program on the basis of their Free Exercise rights, as well as rights to privacy and substantive due process. After rejecting the claims of privacy and due process, the First Circuit held that the plaintiffs' claims did not fall within the hybrid exception because the Free Exercise claim was "not conjoined with an independently protected constitutional protection."[17]

Similarly, the D.C. Circuit in *EEOC v. Catholic University of America*,[18] held that the hybrid rights exception existed only where an independently viable claim was brought along with a Free Exercise claim. The D.C. Circuit held that the university established a Free Exercise claim along with an independently viable claim of excessive entanglement under the Establishment Clause. This supported the university's hybrid rights claim.[19]

---

[16] 68 F.3d 525 (1st Cir. 1995).

[17] *Id.* at 539.

[18] 83 F.3d 455 (D.C. Cir. 1996).

[19] *Id.* at 467.

3. Colorable Claim Approach.

Both the Ninth Circuit and Tenth Circuit have adopted an intermediate approach requiring that a hybrid exception must include both a Free Exercise claim and a conjoined colorable claim of infringement of another constitutional right.

The colorable claim approach was first discussed in *Swanson v. Guthrie Independent School District.*[20] In that case, a girl who was being home-schooled for religious reasons sought to attend public school on a part time basis, but was not permitted to do so by the school district. Her parents brought suit alleging a hybrid claim of violation of Free Exercise rights along with the parents' right to control their daughter's education. The Court rejected the hybrid claim, stating: "Whatever the *Smith*-hybrid rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child."[21]

The colorable claim approach was further explained by the Ninth Circuit in *Thomas v. Anchorage Equal Rights Commission.*[22] That case involved the plaintiffs' refusal to rent property to unmarried couples in violation of both state and city fair housing laws making it unlawful to discriminate against renters on the basis of marital

---

[20] 135 F.3d 694 (10th Cir. 1998).

[21] *Id.* at 700.

[22] 165 F.3d 692 (9th Cir. 1999), *rev'd on other grounds, en banc*, 220 F.3d 1134 (9th Cir. 2000).

status.[23] Plaintiffs claimed they were exempt from the fair housing laws based upon their hybrid claim of violation of their Free Exercise rights, along with companion constitutional claims of their right to free speech and Fifth Amendment right to exclude others from their property.

Citing Justice Souter's dissent in *Lukumi Babalu Aye,* the Ninth Circuit rejected the independently viable claim theory.[24] The Ninth Circuit also rejected that the mere implication of an additional constitutional right would bring a dispute within the hybrid exception, reasoning that "government action will almost always 'implicate' a host of constitutional rights, even though it does not seriously threaten, much less violate any of them."[25] Using mere implication as the standard would turn nearly every Free Exercise case into a hybrid rights case, rendering the general rule of *Smith* a nullity.[26]

The Ninth Circuit concluded that the appropriate standard to establish *Smith's* hybrid exception was to make a colorable claim that a companion right had been infringed.[27] In making this determination, the Ninth Circuit recognized that the colorable claim standard requires a difficult case-by-case determination that would not provide the exactitude of the independent viable rights standard.[28] In a strongly worded dissent, Judge Hawkins

---

[23] *Id.* at 697.

[24] *Id.* at 704 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J. concurring).

[25] *Id.* at 705.

[26] *Id.* at 705.

[27] *Id.* at 705.

[28] *Id.*

expressed doubt as to "whether the hybrid-rights exception even exists."[29] He characterized the hybrid rights exception language in *Smith* as dicta and asserted that the Ninth Circuit should not use a stricter standard to review matters under the Free Exercise Clause depending upon whether other constitutional rights are implicated.[30]

4. Indiana Supreme Court Decision Was Incorrect Under Any Interpretation of the Hybrid Exception.

Under any of the three approaches adopted by the various federal circuits in interpreting the hybrid exception of *Smith,* the decision of the Indiana Supreme Court is erroneous. There is no question that the Indiana blacklisting statutes are neutral statutes of general applicability. These statutes impose a prohibition on all employers against engaging in conduct to prohibit discharged employees from obtaining future employment. The statute has the same general applicability as the prohibition on peyote smoking in *Employment Division v. Smith.* If no hybrid exception exists, then the Indiana court was wrong in holding that "communicative activity" made the Diocese exempt from liability. Saint and sinner alike, all are required to account for violations of the neutral law of general applicability against blacklisting.

The Diocese's claim also fails under either the independently viable approach or the colorable claim approach. The Diocese has made no argument that the

---

[29] *Id.* at 722.

[30] *Id.*

state is prohibited from regulating blacklisting, and that such constitutes an independent violation of the First Amendment's freedom of speech. The Diocese has not in any way challenged the blacklisting statutes other than as applied to the Diocese. Such does not under any test meet the hybrid exception set out in *Smith*.

The decision of the Indiana Supreme Court erroneously interpreted the hybrid exception set forth in *Smith,* and must be reversed.

B. Church Autonomy Doctrine

The Indiana Supreme Court held that the Diocese was immune from liability for violating Indiana's blacklisting statutes based upon the church autonomy doctrine as derived from the First Amendment to the United States Constitution. (App. 11-13). The Indiana court relied upon the pronouncement of the Roman Catholic Church referred to as *Ex Corde Ecclesiae*, which provides that the bishop of a diocese is to communicate and cooperate closely with Roman Catholic universities within the diocese. The Indiana court held that the communication between the Diocese and the University of Notre Dame which constituted illegal blacklisting was an internal matter of church governance and administration, and beyond the reach of statutes or the courts pursuant to the church autonomy doctrine.

This holding that blacklisting conversations are protected by church autonomy is contrary to *Smith* and a perversion of the protections and freedoms under the First Amendment. Never has this Court authorized any entity, by mere pronouncement, to create a self-executing exemption from neutral laws of general applicability. Just as a

religious entity may not exempt itself from drug laws, neither can it immunize itself from prohibited blacklisting conduct.

1. Development of the Church Autonomy Doctrine

Under this Court's First Amendment precedents, "churches have a constitutionally protected interest in managing their own institutions free of government interference."[31] This so-called "church autonomy doctrine" allows churches "to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.[32] But this "does not categorically insulate religious relationships from judicial scrutiny."[33]

The genesis of the church autonomy doctrine seems to rest in *Watson v. Jones*,[34] which involved a dispute over which of two factions was entitled to control of a Presbyterian Church in Louisville, Kentucky. In refusing to become involved in a dispute between pro-Union and pro-Confederacy factions, this Court held that civil courts have no jurisdiction where the matter in dispute was "ecclesiastical in character" or concerned "theological controversy, church discipline, ecclesiastical government."[35]

---

[31] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COL. L. REV. 1373, 1373 (1981).

[32] *Id.* at 1388.

[33] *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

[34] 80 U.S. 679 (1871).

[35] *Id.* at 733.

Over fifty years later, church autonomy was revisited in *Gonzalez v. Roman Catholic Archbishop of Manila*.[36] Gonzalez challenged the archbishop's failure to appoint him as chaplain. In what would later become denominated as the "ministerial exception," this Court rejected any effort to draw civil courts into the determination of qualifications for clergy for any religion. The Court stated:

> [I]t is the function of church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical . . . are accepted in litigation before secular courts as conclusive.[37]

Most recently this Court addressed church autonomy in *Serbian Eastern Orthodox Diocese of America and Canada v. Milivojevich*,[38] in which a bishop in a hierarchical church challenged his defrockment as well as the church's decision to separate one diocese into three. This Court held that the Establishment Clause of the First Amendment precluded civil courts from delving into the interpretation of church governance documents in order to decide the allocation of power within a hierarchical church,[39] stating:

---

[36] 180 U.S. 1 (1929).

[37] *Id.* at 16.

[38] 426 U.S. 696 (1976) (Rehnquist, J. and Stevens, J., dissenting).

[39] *Id.* at 708-09.

> For where resolution of the disputes cannot be made without extensive inquiry by the civil courts into the religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine and polity before them.[40]

In dealing with the Establishment Clause, this Court in 1971 announced the *Lemon*[41] test. To pass constitutional muster under *Lemon*, the law must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive governmental entanglement with religion.[42] But this Court itself has expressed doubt and harsh criticism of the *Lemon* test. Chief Justice Rehnquist has written that *Lemon* has "no more grounding in history of the First Amendment than does the wall theory upon which it rests."[43] Justice Scalia expressed his agreement with a "long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes. . . ."[44] Justice Kennedy has stated

---

[40] *Id.* at 709.

[41] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[42] *Id.* at 612-13.

[43] *Walker v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, C.J. dissenting).

[44] *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

that *Lemon* should not be the "primary guide" for Establishment Clause cases,[45] while Justice Souter remarked that "the Court has isolated no single test of constitutional sufficiency" for Establishment Clause cases.[46] Justice O'Connor has expressed her dissatisfaction with *Lemon* in two separate opinions.[47]

The Indiana Supreme Court mistakenly concluded that the Respondent Diocese was shielded from the consequences of its blacklisting actions by church autonomy. Like Indiana, other state and federal courts have had difficulty reconciling the church autonomy and ministerial exception cases with *Smith* and the uncertainty of the *Lemon* test. Hence it is important for this Court to clarify whether and to what extent religious entities are exempt from neutral laws of general applicability and the extent to which the church autonomy doctrine has survived *Smith*.

Long before *Smith* was decided, a prominent First Amendment scholar noted that, in church autonomy cases, this Court had not yet decided the balance between "the citizen's interest in continuing his religious practice against the government's interest in the regulation that restricts him."[48] More recently, Justice Lipez of the Maine

---

[45] *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring).

[46] *Mitchell v. Helms*, 530 U.S. 793, 869 (2000) (Souter, J., dissenting).

[47] *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) and *Board of Education v. Grumet*, 512 U.S. 687, 718-21 (1994) (O'Connor, J., concurring).

[48] *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (applying religious exemption to Title VII's prohibition against religious discrimination in

(Continued on following page)

Supreme Court commented that church autonomy is "an area of the law in which the U.S. Supreme Court cases offer limited guidance and there remains significant doctrinal uncertainty."[49] After *Smith*, it is even more important for this Court to clarify the relationship between *Smith*, the *Lemon* test and church autonomy.

2. Does Church Autonomy Doctrine Survive *Smith*?

Does the church autonomy doctrine even survive in light of *Smith*? This issue has been addressed by several federal circuit courts, each of which has held that the church autonomy doctrine remained unchanged by *Smith*.[50] According to the Tenth Circuit, the basis for the continued application of the church autonomy doctrine is that *Smith* applies only to religious conduct of individuals, but not to the church itself in matters concerning its internal administration.[51]

However the decision in *Smith* is silent as to any church autonomy exception. Nor does such a limitation make any sense. Nothing in the Constitution grants greater freedoms or rights to organized religions than to

---

employment to secular nonprofit activities of religious organization did not violate establishment clause).

[49] *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 446-47 (Me. 1997) (Lipez, J., dissenting).

[50] *See, Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002); *EEOC v. The Catholic University of America*, 83 F.3d 455, 462 (D.C. Cir. 1996); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999).

[51] 289 F.3d at 656.

individuals exercising their religious beliefs. As Justice Sullivan of the Indiana Supreme Court pointed out in his dissenting opinion, "it is hard to reconcile *Smith* with the doctrine's continued vitality." (App. 16.)

The position expressed in *Smith* that neutral and generally applicable laws must be enforced regardless of religious motivation or belief "cuts against the continued vitality of the church autonomy defense."[52] According to Justice Sullivan, in the few cases in which this Court has applied the church autonomy doctrine, "the law in question was neither neutral nor generally applicable."[53]

3. Even If the Church Autonomy Doctrine Survived *Smith*, It Is Not Applicable to Communication in Violation of Blacklisting Statutes.

Courts have long held that churches are the sole judge of whom shall serve as ministers of the church – the so-called ministerial exception.[54] But as Justice Sullivan noted, neither party suggested that the administrative employment which Petitioner sought at the university was "ministerial." (App. 17). The ministerial exception does not extend to non-ministerial employees hired by religious

---

[52] App. 16, Sullivan, J., dissenting.

[53] *Id. See also, Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 44 (1952).

[54] *See*, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269 (1998), and cases collected therein.

entities.[55] Consequently, the question is whether the First Amendment shields a religious entity from liability when it blacklists a former employee seeking a non-ministerial position at a university, which is a separate and distinct corporate entity.

Even if the church autonomy doctrine remains viable post-*Smith*, it does not provide a "Get Out of Jail Free" card to the Respondent Diocese for activities in violation of Indiana's blacklisting statutes. No decision in the history of this Court has permitted a religious institution to exempt itself from neutral statutes by the simple expedient of issuing a statement – in this case *Ex Corde Ecclesiae* – which unilaterally grants permission to the church to violate the law.

The threshold inquiry with regard to church autonomy is whether the alleged misconduct is "rooted in religious belief."[56] The church autonomy doctrine still holds churches liable for their non-religious transgressions. As the Fourth Circuit explained:

> Of course churches are not – and should not be – above the law. Like any other person or organization, they may be held liable for their torts and

---

[55] *See, DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993) (lay teacher in parochial school not within ministerial exception); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982) (editorial secretary at church-affiliated publishing company not within ministerial exception); *Welter v. Seton Hall University*, 608 A.2d 206 (N.J. 1992) (nuns teaching computer science not ministerial employees).

[56] *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655 (10th Cir. 2002), (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

> upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.[57]

There is nothing "rooted in religious belief" about trying to prevent a former employee from earning a living as a university administrator. Nor does holding the religious entity accountable for its wrongdoing require excessive entanglement by the Court. The entanglement, if any exists at all, is limited to finding out whether the Diocese, though the bishop or otherwise, told the university not to hire Ms. Brazauskas for an administrative position. As this Court noted in *Agostini v. Felton,*[58] some entanglement between church and state are inevitable, but it is only when that entanglement becomes excessive that constitutional protections are brought into play.[59]

Recent events have made the need for secular accountability of religious institutions for violations of civil law all too apparent. Not only have disclosures of sexual child abuse by clergy rocked the nation, but even more damning have been the revelations of institutional conspiracies to hide such abuses by simply moving predatory clergy to locations where they again prey upon their trusting and unsuspecting flocks.[60] Yet courts are strongly

---

[57] *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

[58] 521 U.S. 203 (U.S. 1997).

[59] *Id.* at 233.

[60] *See*, Johanna McGeary, *Can the Catholic Church Save Itself*, TIME MAGAZINE, April 1, 2002, at page 28; Investigative Staff of the Boston Globe, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2002).

divided on whether religious entities may be liable for their actions, even when those actions are illegal or tortious.[61]

The Florida Supreme Court recently faced those issues in the context of negligent hiring and negligent retention claims in *Malicki v. Doe*.[62] The Florida court recognized that there was a significant split in authority over whether permitting negligent hiring and retention claims against a church would unconstitutionally interfere with the church's right to autonomy in matters of church governance.[63] The court noted that neither the asserted sexual abuse of children nor the negligent supervising of such clergy were rooted in religious beliefs. Neutral application of tort law would give no greater or lesser deference to the wrongs committed by religious entities than given to those committed by non-religious entities.[64] Church autonomy was not violated by holding the church liable for torts, where the torts have a secular purpose, and where imposing liability neither advances nor inhibits religion.[65]

---

[61] Among the decisions finding that the First Amendment precludes liability for wrongful supervision of clergy are: *Dausch v. Rykse*, 52 F.3d 1425, 1429 (7th Cir. 1994); *Ayon v. Gourley*, 47 F.Supp. 2d 1246, 1250 (1998); *Teadt v. Lutheran Church Missouri Synod*, 237 Mich. App. 567, 603 N.W.2d 816, 822-23 (1999); *Gibson v. Brewer*, 952 S.W.2d 239, 246-48 (Mo. 1997).

[62] 814 So.2d 347 (Fla. 2002)

[63] *Id.* at 357-59.

[64] *Id* at 361.

[65] *Id.* at 364. In *McKelvey v. Pierce*, the New Jersey Supreme Court went further, authorizing an action by a seminarian against his supervisors and the Diocese of Camden for subjecting him to unwanted

(Continued on following page)

The same is true of the present case. Indiana's blacklisting statutes have a secular purpose – specifically preventing employers from taking actions to prevent former employees from obtaining gainful employment. This does not require determination of questions of faith or doctrine. It does not require excessive entanglement in the governance of a religious entity. Finally, imposing liability for violating those statutes neither advances nor inhibits religion. It merely requires that the law be applicable to all – believer and non-believer alike.

The Indiana Supreme Court decision to the contrary expands the protection of wrongdoing by religious entities beyond permissible bounds. Its decision must be reversed.

---

homosexual advances. The New Jersey court held that even though the claim was being brought by a person in a ministerial position, that was not determinative. Only where the dispute was of a "truly religious nature" was civil review precluded. 173 N.J. 26, 800 A.2d 840 (2002).

CONCLUSION

The issues raised by this Petition are substantial and in need of resolution by this Court. A Writ of Certiorari should be issued to review the decision of the Indiana Supreme Court.

Respectfully submitted,

STEPHEN M. TERRELL
LANDMAN & BEATTY
1150 Market Square Center
151 North Delaware Street
Post Office Box 44953
Indianapolis, IN 46244-0953
(317) 236-1040

Counsel for Petitioner

796 N.E.2d 286

Supreme Court of Indiana.

Beverly M. **BRAZAUSKAS**, Appellant (Plaintiff below),

v.

FORT WAYNE-SOUTH BEND DIOCESE, INC., Sacred Heart Parish, and Jose Martelli, Appellees (Defendants below).

No. 71S03-0205-CV-268.

Sept. 25, 2003.

Stephen M. Terrell, Landman & Beatty, Indianapolis, IN, Edward N. Kalamaros & Associates, South Bend, IN, Attorneys for Appellant.

William T. Hopkins, Jr., Michael A. Scheer, Barnes & Thornburg, Fort Wayne, IN, Attorneys for Appellee.

ON PETITION TO TRANSFER FROM THE INDIANA COURT OF APPEALS, NO. 71A03-0102-CV-55

SHEPARD, Chief Justice.

Appellant Beverly Brazauskas sued Father Jose Martelli and the Fort Wayne-South Bend Catholic Diocese for blacklisting and tortious interference with a business relationship. She claims that after Father Martelli terminated her employment at Sacred Heart Church, he and Bishop John D'Arcy of the Diocese prevented her from obtaining a position at the University of Notre Dame by truthfully informing University President Father Edward Malloy that Brazauskas was suing them over this termination decision.

We conclude that even if this scenario occurred as she describes, her suit fails under the First Amendment's Free Exercise Clause.

Facts and Procedural History

Sacred Heart Parish, a part of the Diocese, is located on the campus of the University of Notre Dame near South Bend. In August 1992, Parish pastor Father Martelli dismissed Brazauskas from her position as Director of Religious Education and Liturgy at Sacred Heart Church.

Brazauskas sued the Diocese (which includes the Parish) and Father Martelli on a variety of grounds, including breach of contract, breach of the covenant of good faith and fair dealing, wrongful discharge, fraud, defamation, promissory estoppel, and infliction of emotional distress. All these claims were eventually dismissed in various proceedings.

While her employment lawsuit was pending, Brazauskas applied for a position as Acting Director of Notre Dame's Program for Church Leaders (PCL), a sabbatical program. In June 1993, a search committee recommended her for the job.

Father Malloy rejected the recommendation, believing that Notre Dame "should not hire someone who has an active lawsuit against the local bishop until that matter [is] resolved." (*Id.* at 422.) He explained, "I consider a[C]atholic university to desirably have a positive and respectful relationship to the [C]atholic church community,

including the local bishop," and hiring someone who had a pending lawsuit "would be a gesture of ill will until such a matter was resolved by the courts." (*Id.* at 423.)[1]

This view is consistent with Ex Corde Ecclesiae, a 1990 directive of Pope John Paul II based on Roman Catholic canon law that addresses the relationship between Catholic universities and local diocesan bishops. Ex Corde Ecclesiae encourages "close personal and pastoral relationships between university and Church authorities characterized by mutual trust, close and consistent cooperation and continuing dialogue." (Appellant's App. at 1013.)

After she failed to receive the PCL position, Brazauskas added claims for blacklisting and tortious interference with a business relationship to her lawsuit against Father Martelli and the Diocese. See Ind.Code Ann. §§ 22-5- 3-1, 2 (West 1991).[2] Brazauskas did not challenge Father Malloy's or Notre Dame's legal right to deny her the PCL position for the reason Father Malloy gave.

---

[1] Father Malloy also ordered dissolution of the PCL, and testified that he thought the program had already been eliminated. (Appellant's App. at 407.) Brazauskas has gone to lengths to try to prove that Father Malloy terminated the program "to implement the Bishop's desires that Beverly Brazauskas not be hired at Notre Dame." (Appellant's Br. at 13.) For reasons explained below this makes no difference to the resolution of this case.

[2] The Diocese defendants correctly point out that the more appropriately styled claim would be tortious interference with prospective advantage. (Appellee's Br. at 22); *see Kiyose v. Trustees of Ind. Univ.*, 166 Ind.App. 34, 333 N.E.2d 886 (1975).

In February 2001, the trial court dismissed both of these claims for lack of subject matter jurisdiction. The Court of Appeals affirmed. *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 755 N.E.2d 201 (Ind.Ct.App. 2001). We granted transfer, and now affirm, concluding that the trial court had jurisdiction over the matter but that the Diocese defendants were entitled to judgment on the merits.

I. The Procedural Posture

As a preliminary matter, we address the appropriate procedure for seeking dismissal of a suit by asserting a Free Exercise Clause defense.

In 1997, the trial court denied the Diocese defendants' motion for summary judgment on the tortious interference and blacklisting claims. On appeal of this ruling, the Court of Appeals noted *sua sponte* that the Diocese defendants should have challenged subject matter jurisdiction via motions to dismiss for lack of subject matter jurisdiction under Indiana Trial Rule 12(B)(1) rather than via summary judgment motions. *See Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253, 259 (Ind.Ct. App.1999). Following that guidance, the Diocese defendants accordingly argue that the trial court lacked subject matter jurisdiction over the tortious interference and blacklisting claims under Rule 12(B)(1).

Other courts have resolved this procedural question differently. In *Bryce v. Episcopal Church,* 289 F.3d 648 (10th Cir. 2002), the Tenth Circuit dealt with an analogous claim brought by two church members claiming sexual harassment in the form of remarks made during parish meetings about homosexuals and the two members'

homosexual activities. *Id.* at 651-53. The church responded that the remarks were part of ecclesiastical discussions on church policy, so the claims were barred. *Id.* at 651.

Applying rules of federal procedure, the Tenth Circuit treated the church's challenge as a Rule 12(B)(6) motion to dismiss for failure to state a sufficient claim. *Id.* at 654. It found no abuse of discretion by the trial court in considering evidence beyond the pleadings, thereby converting the motion to dismiss into a summary judgment motion, and affirmed judgment for the church. *Id.* at 654, 660. *See also McKelvey v. Pierce,* 173 N.J. 26, 800 A.2d 840, 844 (2002) (applying state rules of procedure and treating contract and tort suit by former seminarian claiming damages stemming from unwanted homosexual advances as motion for judgment on the pleadings that effectively became a summary judgment motion).

We agree with the approach taken by these two courts, and hold that the trial court erred in concluding that it lacked jurisdiction over this matter. A court with general authority to hear matters like employment disputes is not ousted of subject matter or personal jurisdiction because the defendant pleads a religious defense. Rather, pleading an affirmative defense like the Free Exercise Clause may under certain facts entitle a party to summary judgment.

We will proceed with our review using the standard applicable to summary judgment, as the trial court did not exclude matters submitted outside the pleadings. *See* Ind. Trial R. 12(B), 56. We will therefore consider whether there is any genuine issue of material fact and whether the Diocese defendants as the moving parties are entitled to judgment as a matter of law. T.R. 56. In doing so, we

construe all facts and reasonable inferences in the light most favorable to Brazauskas as the nonmoving party. *See State Farm Fire & Cas. Co. v. T.B.*, 762 N.E.2d 1227 (Ind.2002).

II. The Changed Landscape of Blacklisting Law

Had these events occurred two years later, our disposition would be quite simple. In 1993, Indiana's blacklisting statute read about the same as it had upon initial enactment in 1889, namely:

> A person who, after having discharged any employee from his service, prevents the discharged employee from obtaining employment with any other person commits a Class C infraction, and is liable in penal damages to the discharged employee, to be recovered by a civil action; but this section does not prohibit a person from informing, in writing, any other person to whom the discharged employee has applied for employment, a truthful statement of the reasons for discharge.
>
> If any railway company or any other company or partnership or corporation in this state shall authorize, allow or permit any of its or their agents to black-list any discharged employees, or attempt by words or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left said company's service, from obtaining employment with any other person, or company, said company shall be liable to such employee in such sum as will fully compensate him, to which may be added exemplary damages.

Ind.Code Ann. §§ 22-5-3-1, 2 (West 1991).

In 1995, however, the General Assembly added an important exception:

> An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made.

Ind.Code Ann. § 22-5-3-1(b) (West 2002).

Brazauskas does not claim that any of the alleged disclosures that led to her denial of the PCL position were false. She would therefore have no claim for blacklisting under the revised statute.

She would likewise not have a claim for tortious interference, because in Indiana this tort requires some independent illegal action. *See, e.g., Watson Rural Water Co., Inc. v. Ind. Cities Water Corp.*, 540 N.E.2d 131 (Ind.Ct.App.1989). Brazauskas' only other allegation of illegal conduct is the blacklisting claim (Appellant's Br. at 18) so both would fail with no need to reach the Diocese defendants' constitutional argument.

III. The Factual Premise

Notwithstanding subsequent legislative action, we must apply the statute as it existed in 1993. Brazauskas' complaint alleges that the Bishop and Father Martelli prevented her from obtaining employment at Notre Dame.[3]

---

[3] She also complains that the defendants prevented her from obtaining employment at any other Parish or Catholic institution in the

(Continued on following page)

She bases her claim primarily on a letter Father Martelli wrote more than six months before she applied for the PCL job and on influence allegedly exerted by the Bishop that prompted Father Malloy to deny Brazauskas the position.

Father Martelli's writing was a response to two letters he received from one of Brazauskas' supporters, Notre Dame Theology Department Assistant Chairman Kern Trembath. In the first letter, Dr. Trembath accused Father Martelli of scandalizing the Church by firing Church employees, saying, "the fact that you are allowed to remain a priest is simply and strictly a measure of the worldwide shortage of priests." (Appellant's App. at 1082.) He described Father Martelli as "a bad priest, and . . . not a cultural American." (*Id.*) Dr. Trembath and his wife followed up with a second letter a week later, threatening legal action on their own behalf and demanding "[c]omplete resolution of Beverly Brazauskas' issue against you to the satisfaction of her and her attorney." (*Id.* at 1083.)

In early November, Father Martelli sent copies of these letters to Father Malloy, along with his own letter saying that the Trembath letters "include charges and accusations so alarming in nature that I would be remiss not to bring them to your attention." (*Id.* at 1081.) Martelli's letter mentioned Brazauskas only to explain that her termination had precipitated this verbal assault, and did not criticize her or her actions. (*Id.*) Father Martelli

---

Diocese, but this complaint is waived for lack of argument that she sought or was denied any such positions. *See* Ind. Appellate. Rule 46(A)(8)(b).

stated that he was writing "for your information and not with the intent of causing more trouble for anyone." (*Id.*) He copied the correspondence to Bishop D'Arcy, among others.

Brazauskas does not explain how such a letter could support a reasonable inference that by making others aware of Trembath's accusations Father Martelli prevented her from getting the PCL position.

Her allegations against the Bishop are on similarly shaky factual ground. Both Bishop D'Arcy and Father Malloy deny that they ever discussed the PCL position, much less Brazauskas' candidacy. (Appellant's App. at 139-40, 422- 24.) Brazauskas says she can prove otherwise, through circumstantial evidence such as records of telephone calls between the Bishop and Father Malloy's office. (*See* Appellant's Br. at 9-10.) The evidence she offers is at most marginally sufficient to raise a genuine issue of material fact, but for reasons explained below her claim would fail in any event.

IV. Ex Corde Ecclesiae

The Diocese defendants successfully argued to the trial court and Court of Appeals that they lacked jurisdiction because secular review of Brazauskas' claims would constitute excessive entanglement and violate the Free Exercise clause of the First Amendment of the U.S. Constitution, which is applicable to the states through the Fourteenth Amendment. *Brazauskas,* 755 N.E.2d at

207-08.[4] They likewise urge us to hold that Ex Corde Ecclesiae forecloses court inquiry because under the First Amendment courts may neither interpret such documents nor penalize the practice of religion in fulfillment of the provisions of such a document. (Appellees' Br. at 40.)

This argument is somewhat circular. We cannot simply accept that Ex Corde Ecclesiae governed the alleged action without some review of the document. *See Draskovich v. Pasalich,* 151 Ind.App. 397, 401, 280 N.E.2d 69, 72 (1972) ("Notwithstanding the limitations imposed on the civil courts . . . the civil courts can (and indeed must in some cases) look at ecclesiastical documents and related evidence concerning religious rites, doctrines, polity and practices for the limited purpose of determining the nature of the church organization.")

We also cannot accept without question an assertion that the courts may not review the legality of an action because that action was pursuant to a directive from higher church authority. *See Employment Div. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith,* the plaintiffs ingested peyote during a sacramental ceremony of their Native American Church. *Id.* at 874, 110 S.Ct. 1595. They were consequently fired from their jobs at a drug rehabilitation organization and denied unemployment benefits. *Id.*

The Supreme Court upheld the denial of benefits, holding that the Free Exercise Clause does not exempt religiously motivated action from neutral laws of general

---

[4] They make no claim under the Indiana Constitution, so we do not address its applicability to the case.

applicability. *Id.* at 881-82, 890, 110 S.Ct. 1595. Therefore, under *Smith,* church directives such as Ex Corde Ecclesiae are not the end of the story, because they do not automatically insulate the faithful from such neutral laws of general applicability as Indiana's blacklisting statute.

This is not to say that Ex Corde Ecclesiae is wholly irrelevant to this case. It establishes that higher church authority (namely, the Pope) has directed Catholic universities such as Notre Dame and local Catholic diocese officials to cooperate closely, communicate, and develop an environment of mutual trust. Bishop D'Arcy and other diocesan personnel would therefore be acting in accordance with ecclesiastical directive in keeping Father Malloy apprised of diocesan developments, including pending lawsuits, and in coordinating with him on administrative and policy matters.

V. The Church Autonomy Doctrine After Smith

There is an important and relevant limitation in the *Smith* decision. Justice Scalia specifically noted that the case presented "a free exercise claim unconnected with any communicative activity." *Id.* at 882, 110 S.Ct. 1595. Here, in contrast, the challenged activity was communicative.[5]

---

[5] In her complaint Brazauskas alleges, despite Bishop D'Arcy's deposition testimony that he had "no clout" in employment-related matters at Notre Dame, that the Diocese exercised "abuse of power . . . undue influence and/or duress" in preventing her employment as PCL director. (Appellee's App. at 20, 142; Appellant's Br. at 8.) Brazauskas supports this contention only by asserting that Ex Corde Ecclesiae, which calls only for cooperative effort, gives the Bishop authoritative

(Continued on following page)

Smith is distinguishable in another important respect, because it did not implicate the church autonomy doctrine. This doctrine deals with a church's First Amendment right to autonomy in "making decisions regarding [its] own internal affairs," including matters of faith, doctrine, and internal governance. *Bryce,* 289 F.3d at 655.

The *Bryce* court cited *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952), in which the Supreme Court applied the First Amendment and struck down a statute that reassigned control over a cathedral among church officials. In *Kedroff,* the Court said that religious freedom encompasses "an independence from secular control or manipulation, in short, power [of churches] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116-17, 73 S.Ct. 143.

The Tenth Circuit concluded, and we agree, that "[t]he Supreme Court's decision in *Employment Division v. Smith* . . . does not undermine the principles of the church autonomy doctrine." *Bryce,* 289 F.3d at 656. *See also EEOC v. Catholic Univ. of Am.,* 83 F.3d 455, 462 (D.C.Cir.1996) (Free Exercise clause forbids governmental action that encroaches on a church's ability to manage its internal affairs).

---

influence over Notre Dame. (Appellant's Br. at 8, n. 2.) This is not enough to support a reasonable inference that the Bishop controlled the decision regarding Notre Dame's PCL director, but even assuming that he did exercise decisive influence over this undisputedly legal action, our conclusion would be the same.

This doctrine does, of course, have limits. As the New Jersey Supreme Court recently said, "The First Amendment does not immunize every legal claim against a religious institution and its members. The analysis in each case is fact-sensitive and claim specific, requiring an assessment of every issue raised in terms of doctrinal and administrative intrusion and entanglement." *McKelvey,* 800 A.2d at 844 (finding genuine issues of material fact as to whether former seminarian's claim that unwanted homosexual advances damaged his career prospects could be litigated without offending First Amendment principles).

Brazauskas would have us apply the blacklisting statute and tort law to penalize communication and coordination among church officials (all answerable to higher church authority that has directed them to work cooperatively) on a matter of internal church policy and administration that did not culminate in any illegal act. Such a holding would violate the church autonomy doctrine and run counter to the Court's declaration in *Cantwell v. Connecticut,* 310 U.S. 296, 307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940): "The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged."[6]

---

[6] This is not to say that the Free Exercise Clause would prevent prosecution for an agreement with another person to commit a felony, even if that other person is another church member or official and the agreement implicates ecclesiastical issues, if the state also proves an overt act in furtherance of that agreement in accordance with Indiana's conspiracy statute. *See* Ind.Code Ann. § 35-41-5-2 (West 2001). For example, a defendant charged with conspiracy to commit murder via

(Continued on following page)

We therefore conclude that under these facts the Free Exercise Clause entitles the defendants to summary judgment on Brazauskas' blacklisting claim. Her tortious interference claim fails for similar reasons, as well as the fact that she has not proven any illegal conduct by the Diocese defendants.

Conclusion

We reverse dismissal of the case for lack of subject matter jurisdiction, and remand for entry of summary judgment in favor of the Diocese defendants.

DICKSON, BOEHM, and RUCKER, JJ., concur.

SULLIVAN, J., concurs in part and dissents in part with separate opinion.

SULLIVAN, Justice, concurring in part and dissenting in part.

I agree with the majority that the trial court had jurisdiction and that Plaintiff's allegations of blacklisting and interference are "at most marginally sufficient to raise a genuine issue of material fact." Maj. Op. at 7. But I disagree that the Diocese is entitled to summary judgment as a matter of law.

Employment Div. v. Smith, 494 U.S. 872, 881, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), announced that the First Amendment rarely "bars application of a neutral,

---

terroristic attacks could not insulate himself from liability merely by claiming that the agreement element of the crime occurred within a protected discussion of church doctrine or policy.

generally applicable law to religiously motivated action." The Indiana blacklisting statute and common law tort of interference with prospective advantage at issue here are neutral laws of general applicability. The majority holds that, notwithstanding *Smith,* the Diocese is entitled to summary judgment as a matter of law for two reasons. First, the majority finds that the challenged activity here was "communicative" and that *Smith* contains an exception to its general rule for Free Exercise claims connected with "communicative activity." Second, the majority finds that the challenged activity here is protected by the "church autonomy doctrine" that survived *Smith.*

As to the communicative activity defense, the phrase from *Smith* cited by the majority is part of a larger discussion in which the Supreme Court stated its precedents could not be read to allow individuals to engage in otherwise prohibited conduct merely because the conduct is accompanied by religious conviction. *See Smith,* 494 U.S. at 882, 110 S.Ct. 1595 ("'Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.'") (quoting *Gillette v. United States,* 401 U.S. 437, 461, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971)). As such, it does not establish an exception from *Smith's* general rule for all communicative activity. At most, the term "communicative activity" encompasses merely that communicative activity that is protected by constitutional provisions other than the Free Exercise Clause. *Smith,* 494 U.S. at 881-82, 110 S.Ct. 1595 (discussing prior cases). In my view, the "communicative

activity" that forms the basis of Brazauskas's claims does not meet this standard.[1]

As to the church autonomy doctrine defense, the Supreme Court has not yet had occasion to make clear whether this doctrine survived *Smith.*[2] I find it hard to reconcile *Smith* with the doctrine's continued vitality, at least as applied to the facts of this case.

Smith held to be constitutional a law banning the sacramental use of peyote because the law was both neutral and generally applicable. 494 U.S. at 878-82, 890, 110 S.Ct. 1595. A central concern behind *Smith's* neutrality principle is the notion that a private right to ignore neutral and generally applicable laws is, and should remain, a constitutional anomaly. *See Smith,* 494 U.S. at 879, 885, 110 S.Ct. 1595. The arguments used to support the neutral and generally applicable standard cut against the continued vitality of the church autonomy defense. Mere religious belief has never been a cognizable shield "from compliance with an otherwise valid law prohibiting conduct the State is free to regulate." *Smith,* 494 U.S. at 879, 110 S.Ct. 1595. Indeed, in the few cases where the U.S. Supreme Court applied the church autonomy defense, the law in question was neither neutral nor generally applicable. *See Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.,* 344 U.S. 94, 73 S.Ct.

---

[1] None of the majority, Brazauskas, or the Diocese appear to suggest that the disputed communicative activity would be constitutionally protected absent the claim of religious conviction.

[2] I acknowledge the majority's citations to two federal Courts of Appeal that have so held. *Bryce v. Episcopal Church,* 289 F.3d 648 (10th Cir. 2002); *EEOC v. Catholic Univ. of Am.,* 83 F.3d 455 (D.C.Cir. 1996).

143, 97 L.Ed. 120 (1952) (invalidating 1925 New York statute that effectively put the Russian Orthodox churches of New York under the administration of the Russian Church in America).

Even if the church autonomy defense survived *Smith,* I do not believe it bars Brazauskas's claim.

The church autonomy doctrine prohibits the government from "lend[ing] its power to one or the other side in controversies over religious authority or dogma." *Smith,* 494 U.S. at 877, 110 S.Ct. 1595. Since its inception, the doctrine has resonated most strongly in cases involving members of the clergy because these are the cases that run the greatest risk of forcing the government to take sides in a factional religious dispute. But courts have not used the Free Exercise Clause to bar claims by non-ministerial employees of a religious institution. *See* Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees,* 74 Ind. L.J. 269, 276 (1998).

Moreover, the church autonomy defense does *not* prohibit a state court from resolving church disputes if the court can and does resort to neutral principles of law and applies them in a secular fashion. *See Jones v. Wolf,* 443 U.S. 595, 602-04, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) (analyzing church property dispute by using neutral principles of law). This is because in so doing, a state court avoids making determinations of the underlying religious dispute.

In the present case, Brazauskas claims that certain individuals unlawfully denied her the opportunity to work at a university. Neither party suggested, as the church autonomy defense has traditionally required, that her

prospective position would have involved ministerial-type duties. To the extent that Brazauskas's claim can be characterized as a religious dispute at all, the church autonomy defense does not bar a claim where neutral principles of law are available to resolve the case. The Indiana blacklisting statute and the tort of interference with prospective advantage are religiously neutral and generally applicable. Far from advantaging any particular religious faction or group, the laws provide for the general welfare by protecting an open and free market of labor in all spheres. The Legislature could have accommodated custom by providing an exception to the law but it did not. Neither the Indiana blacklisting statute nor the tort of interference with prospective advantage benefits any one religious faction over any other. And just as there was no contention in *Smith* that the Oregon drug law was "an attempt to regulate religious beliefs," neither is there any similar contention here. *See Smith,* 494 U.S. at 882, 110 S.Ct. 1595.

---

755 N.E.2d 201

Court of Appeals of Indiana.

Beverly M. BRAZAUSKAS, Appellant-Plaintiff,
v.
FORT WAYNE-SOUTH BEND DIOCESE, INC., Sacred Heart Parish, and Jose Martelli, Appellees-Defendants.

No. 71A03-0102-CV-55.

Sept. 7, 2001.

Stephen M. Terrell, Landman & Beatty, Indianapolis, IN, Attorney for Appellant.

William T. Hopkins, Jr., Michael A. Scheer, Barnes & Thornburg, Fort Wayne, IN, Attorneys for Appellees.

OPINION

SHARPNACK, Chief Judge.

Beverly M. Brazauskas appeals the trial court's dismissal of her claims against Fort Wayne South Bend Diocese, Inc. ("the Diocese"), Sacred Heart Parish ("the Parish"), and Father Jose Martelli (collectively, "the Diocese defendants"). Brazauskas raises four claims, which we consolidate and restate as whether the trial court erred when it granted the Diocese defendants' motion to dismiss. We affirm.[1]

The relevant facts follow. The Parish is part of the Diocese and is located in South Bend on the campus of the

[1] Appellant's Petition for oral argument is hereby denied.

University of Notre Dame ("Notre Dame").[2] Brazauskas had been employed at the Parish as a Pastoral Associate since 1987. However, Fr. Martelli, the Parish's pastor, dismissed Brazauskas on August 7, 1992. On February 26, 1993, Brazauskas filed suit against the Diocese defendants, alleging, among other claims, tortious interference with a business relationship.

While the suit was pending, a Notre Dame committee sought applicants to fill the position of Acting Director for Notre Dame's Program for Church Leaders ("PCL"). Brazauskas applied for the job. After interviewing her, the committee conducting the search for an Acting Director unanimously recommended Brazauskas for the position on June 4, 1993. At some point between June 4 and June 18, 1993, Father Edward Malloy, the President of Notre Dame, was informed that Brazauskas was the recommended candidate for Acting Director of the PCL. Fr. Malloy rejected Brazauskas's candidacy because she was suing the Diocese, including its Bishop, John D'Arcy, and he concluded that hiring her would harm the relationship between the Diocese and Notre Dame. Furthermore, Fr. Malloy expressed surprise that the PCL was still in existence because he thought that it had been dissolved. The PCL was subsequently phased out.

Brazauskas believed that the Diocese defendants had contacted Notre Dame officials and induced them to avoid hiring her, even if they had to eliminate the PCL to do so.

---

[2] As we discuss below, Notre Dame is not a part of the Diocese's organizational hierarchy, although it is expected to maintain a close relationship with the Diocese's bishop.

Accordingly, on August 5, 1993, she filed an amended complaint in which she amended her claim of tortious interference with a business relationship to include an allegation that the Diocese defendants had interfered with Notre Dame's hiring process. On September 7, 1995, Brazauskas further amended her complaint by accusing the Diocese defendants of blacklisting her.

In five separate motions, the Diocese defendants moved for summary judgment on all of Brazauskas's claims. The trial court granted summary judgment on all of Brazauskas's claims except her claims for tortious interference with a business relationship and blacklisting. Brazauskas appealed the trial court's grant of partial summary judgment, and we affirmed in part, vacated in part, and remanded for further proceedings.[3] *See Brazauskas v. Fort Wayne-South Bend Diocese,* 714 N.E.2d 253, 264 (Ind.Ct.App.1999), *trans. denied* ("*Brazauskas I*").

On remand, the Diocese defendants moved to dismiss Brazauskas's tortious interference and blacklisting claims on January 5, 2001. On February 7, 2001, after a hearing, the trial court granted the Diocese defendants' motion.

The sole issue is whether the trial court erred when it granted the Diocese defendants' motion to dismiss. In its

---

[3] We vacated the trial court's ruling on Brazauskas's claim for breach of contract. *Brazauskas I,* 714 N.E.2d at 260. However, the trial court subsequently dismissed that claim, and it is not at issue here.

order, the trial court provided that dismissal was appropriate "for the reason that this Court lacks subject matter jurisdiction to hear those claims." Appellant's App., p. 25. Consequently, we shall review the trial court's ruling as a dismissal for lack of subject matter jurisdiction pursuant to Ind. Trial Rule 12(B)(1).[4]

When ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court may consider not only the complaint and motion but also any affidavits or evidence submitted in support. *GKN Co. v. Magness,* 744 N.E.2d 397, 400 (Ind.2001). In *Magness,* our supreme court clarified the standard of review for appellate review of a trial court's ruling on a motion to dismiss for lack of subject matter jurisdiction. The court provided:

> A review of the case authority shows that the standard of appellate review for Trial Rule 12(B)(1) motions to dismiss is indeed a function of what occurred in the trial court. That is, the standard of review is dependent upon: (i) whether the trial court resolved disputed facts; and (ii) if the trial court resolved disputed facts, whether it conducted an evidentiary hearing or ruled on a 'paper record.'
>
> * * *

---

[4] Ind. Trial Rule 12(B)(1) provides, in relevant part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required; except that at the option of the pleader, the following defenses may be made by motion:
>
> (1) Lack of jurisdiction over the subject-matter, ...

If the facts before the trial court are in dispute, then our standard of review focuses on whether the trial court conducted an evidentiary hearing. Under those circumstances, the court typically engages in its classic fact-finding function, often evaluating the character and credibility of witnesses. Thus, where a trial court conducts an evidentiary hearing, we give its factual findings and judgment deference. And in reviewing the trial court's factual findings and judgment, we will reverse only if they are clearly erroneous. Factual findings are clearly erroneous if the evidence does not support them, and a judgment is clearly erroneous if it is unsupported by the factual findings or conclusions of law.

> However, where the facts are in dispute but the trial court rules on a paper record without conducting an evidentiary hearing, then no deference is afforded the trial court's factual findings or judgment because under those circumstances a court of review is 'in as good a position as the trial court to determine whether the court has subject matter jurisdiction.' Thus, we review de novo a trial court's ruling on a motion to dismiss where the facts before the court are disputed and the trial court rules on a paper record.

Magness, 744 N.E.2d at 401 (citations omitted).

Here, there are several disputes of fact. However, the trial court did not conduct an evidentiary hearing. Instead, it "held oral argument" on the Diocese defendants' motion to dismiss. Appellant's App., p. 25. Thus, we conclude that the trial court ruled upon a paper record without an evidentiary hearing, and we shall review its ruling under a de novo standard. *See Magness,* 744 N.E.2d at 401. In so doing, we will affirm the judgment of the trial court on any legal theory that the evidence of record supports. *Id.*

The central issue in this case is whether the First Amendment to the United States Constitution bars Brazauskas's remaining claims against the Diocese defendants. The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits courts from resolving doctrinal disputes or determining whether a religious organization acted in accordance with its canons and bylaws. *See Konkle v. Henson,* 672 N.E.2d 450, 454 (Ind.Ct.App.1996) (citing *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 713, 96 S.Ct. 2372, 2382, 49 L.Ed.2d 151 (1976), *reh'g denied,* 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976)). Even where a dispute presented to the court is one that, if presented by any other set of litigants, would clearly be justiciable, if the resolution of that dispute between the litigants at hand would require the court to adjudicate matters of church doctrine or governance, or to second-guess ecclesiastical decisions made by a church body created to make those decisions, the matter falls outside the court's authority. *Downs v. Roman Catholic Archbishop,* 111 Md.App. 616, 683 A.2d 808, 811 (1996), *reconsideration denied.*

The First Amendment does not entirely prohibit courts from opening their doors to religious organizations. *Konkle,* 672 N.E.2d at 455. Instead, a court can apply neutral principles of law to churches without violating the First Amendment. *Id.* However, the application of neutral principles of law to a church defendant has occurred only in cases involving church property or in cases where a church defendant's actions could not have been religiously motivated. *See Brazauskas I,* 714 N.E.2d at 262. For example, in *Konkle,* a priest-defendant molested the plaintiff and his superiors may have known about prior molestations but failed to act, and we concluded that the

First Amendment did not bar the plaintiff's claims. *See Konkle,* 672 N.E.2d at 456.

As this precedent indicates, if, in resolving Brazauskas's claims of tortious interference with a business relationship and blacklisting, we would be required to interpret Catholic precepts and procedures to determine whether the allegedly tortious behavior was undertaken in compliance with religious teaching, then the First Amendment bars our inquiry, and the trial court did not err when it dismissed the claims. If, on the other hand, review of the claims would not require any inquiry into religious doctrine or practice, but rather involves application of secular standards to secular conduct, the First Amendment does not prevent Brazauskas from proceeding with her suit. *See Konkle,* 672 N.E.2d at 456. We will address each of Brazauskas's claims in turn.

I.

In Indiana, blacklisting is governed by statute. Ind.Code § 22-5-3-1 provides, in relevant part, "A person who, after having discharged any employee from his service, prevents the discharged employee from obtaining employment with any other person commits a Class C infraction and is liable in penal damages to the discharged employee to be recovered by civil action;. . . . " Furthermore, Ind.Code § 22-5-3-2 provides:

> If any railway company or any other company, partnership, limited liability company, or corporation in this state shall authorize, allow or permit any of its or their agents to black-list any discharged employees, or attempt by words or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left said

> company's service, from obtaining employment with any other person, or company, said company shall be liable to such employee in such sum as will fully compensate him, to which may be added exemplary damages.

Brazauskas alleges that the Diocese defendants blacklisted her by interfering with Notre Dame's hiring process for the Acting Director position. She points to the following evidence as support:

> 1. On November 4, 1992, Fr. Martelli sent a letter to Fr. Malloy and other Notre Dame officials informing them of Brazauskas's termination and of subsequent vehement protests he had received from Brazauskas's friends, including the assistant chairperson of Notre Dame's Department of Theology;
>
> 2. Subpoenaed phone records, which show that phone calls were exchanged between Notre Dame officials and Bishop D'Arcy's office during the time when Brazauskas was being considered for the Acting Director position;
>
> 3. Notre Dame officials justified the dissolution of the PCL by saying that a review committee had recommended that step, when evidence indicated that none of the members of the committee had suggested that the PCL should be dissolved;
>
> 4. Fr. Malloy at one time indicated that he had been involved in the decision to dissolve the PCL only because the University Provost was out of the country, when other evidence shows that he decided to eliminate the PCL several days before the Provost left;
>
> 5. Fr. Malloy denied being contacted by Fr. Martelli about Brazauskas's firing until he was shown the letter that Fr. Martelli had sent to him, and he denied any relationship with the Parish although he had

served as honorary chairman of the Parish's fund-raising campaign; and

6. The Dean of Notre Dame's College of Science told a friend of Brazauskas that Bishop D'Arcy had personally intervened with Fr. Malloy regarding Brazauskas's application to the PCL, and had complained to Fr. Malloy that he was being personally attacked and vilified.[5]

The Diocese defendants respond that even if Fr. Martelli, Bishop D'Arcy or other high-ranking Diocese officials contacted Notre Dame officials while Brazauskas was under consideration for the Acting Director job, they did so pursuant to Catholic Church doctrine, and we may not inquire further.

The Diocese defendants cite to a document issued by Pope John Paul II to address the role of Catholic universities in the Catholic Church. In this document, Pope John Paul II writes,

> Bishops have a particular responsibility to promote Catholic universities, and especially to promote and assist in the preservation and strengthening of their Catholic identity, including the protection of their Catholic identity in relation to civil authorities. This will be achieved more effectively if close personal and pastoral relationships exist between universities and Church authorities characterized by mutual trust, close and consistent cooperation and consistent dialogue. Even when they do not enter directly into the

[5] The Diocese defendants vigorously refute this fact, claiming that the Dean never made this statement and that Brazauskas's friend erroneously attributed the statement to the Dean.

> internal governance of the university, bishops should be seen not as external agents but as participants in the life of the Catholic university.

POPE JOHN PAUL II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE OF THE SUPREME PONTIFF 20 (St. Paul Books & Media 1991) (quotation omitted) ("Ex Corde Ecclesiae").

Ex Corde Ecclesiae also sets forth a number of "General Norms," which are based on the Catholic Church's Code of Canon Law and are to be "applied concretely" by Episcopal conferences and Catholic universities. *Id.* at 30. Article Five of the General Norms provides, in relevant part:

> § 1. Every Catholic university is to maintain communion with the universal Church and the Holy See; it is to be in close communion with the local Church and in particular with the diocesan bishops of the region or nation in which it is located. . . .
>
> § 2. Each bishop has a responsibility to promote the welfare of the Catholic universities in his diocese and has the right and duty to watch over the preservation and strengthening of their Catholic character.

Id. at 33-34. In addition, Article Six provides, in relevant part, "A sufficient number of qualified people – priests, religious, and lay persons – are to be appointed to provide pastoral ministry for the university community, carried on in harmony and cooperation with the pastoral activities of the local Church under the guidance or with the approval of the diocesan bishop." *Id.* at 34-35.

In the instant case, Fr. Martelli's November 4, 1992, letter to Fr. Malloy refers to letters of protest he had received from Brazauskas's friends, including Kern

Trembath, the assistant chairperson of Notre Dame's theology department. In his letter, Fr. Martelli wrote that the letters "include charges and accusations so alarming in nature that I would be remiss not to bring them to your attention." Appellant's App., p. 945. Fr. Martelli's letter reflects an apparent intent to keep Fr. Malloy informed of events affecting both the Parish and Notre Dame. According to Ex Corde Ecclesiae, there should be "close and consistent cooperation and consistent dialogue" between university officials and Church authorities. EX CORDE ECCLESIAE at 20. Given Fr. Martelli's ecclesiastical encouragement to remain in contact with Notre Dame officials, we conclude that further inquiry into whether he engaged in blacklisting would require us to interpret his intent in relation to church doctrine, thereby violating the First Amendment. *See, e.g., Brazauskas I,* 714 N.E.2d at 263.

Turning to the Parish and the Diocese, assuming without deciding that Bishop D'Arcy or other Diocese officials contacted Fr. Malloy and other Notre Dame officials and urged them not to hire Brazauskas, we are of the opinion that the First Amendment bars further litigation of Brazauskas's blacklisting claim against the Parish and the Diocese. Because Diocese officials and Notre Dame officials are commanded to remain "in close communion" with one another pursuant to Ex Corde Ecclesiae, the contacts have an ostensibly ecclesiastical basis. EX CORDE ECCLESIAE at 33.

In addition, there is evidence that the Acting Director position that Brazauskas sought is a pastoral or ministerial position. Brazauskas testified that because she did not get the Acting Director job, her future involvement in church ministry was precluded because "there aren't many

more opportunities in the Catholic church for that type of ministry in this area." Appellees' App., p. 1162. Ex Corde Ecclesiae provides that pastoral activities at a Catholic university are required to have the diocesan Bishop's approval or guidance, thereby further demonstrating that the Diocese officials' contacts also could have had a doctrinal basis. EX CORDE ECCLESIAE at 34. Consequently, any further inquiry would require this court to scrutinize the Diocese defendants' behavior in connection with religious doctrine. *See, e.g., Brazauskas I,* 714 N.E.2d at 263. This we cannot do. *See id.*

Brazauskas asserts that the Diocese defendants are citing Ex Corde Ecclesiae and raising the defense of church doctrine as an after-the-fact rationalization of their allegedly illegal behavior. However, as we discussed in *Brazauskas I,* "the First Amendment prevents this Court from scrutinizing the possible interpretations of defendants' statements and their purported reasons for uttering them." *Id.* Consequently, the trial court lacked subject matter jurisdiction over Brazauskas's blacklisting claim, and it did not err when it dismissed this claim. *See Id.*

II.

Turning to Brazauskas's claim for tortious interference with a business relationship, the elements of that tort are: 1) the existence of a valid relationship; 2) the defendant's knowledge of the existence of the relationship; 3) the defendant's intentional interference with that relationship; 4) the absence of justification; and 5) damages resulting from defendant's wrongful interference with the relationship. *Bradley v. Hall,* 720 N.E.2d 747, 750 (Ind.Ct.App.1999). Contrary to the parties' assertions, a

plaintiff is not required to also plead illegal conduct in order to sustain this cause of action. *See id.* at 751.

Brazauskas refers to the same facts outlined in her blacklisting claim to support her tortious interference claim against the Diocese defendants. Once again, however, considering Fr. Martelli's letter and assuming without deciding that Diocese officials contacted Notre Dame officials about Brazauskas's application, we conclude that the Diocese defendants have presented ostensibly ecclesiastical justifications for their actions. As the Parish pastor on Notre Dame's campus, Fr. Martelli is encouraged to have "close and consistent cooperation and consistent dialogue" with Notre Dame officials. EX CORDE ECCLESIAE at 20. Furthermore, Notre Dame is required to be in "close communion" with Bishop D'Arcy and other Diocese officials, and pastoral activities at Notre Dame must be carried on with Bishop D'Arcy's guidance or approval. *See id.* at 33-34. Therefore, because the Diocese defendants' actions had a possible doctrinal basis, the First Amendment forbids the courts from becoming involved in this ecclesiastical dispute. *See Brazauskas I,* 714 N.E.2d at 263; *cf. Konkle,* 672 N.E.2d at 456 (determining that the plaintiff's claims were not barred by the First Amendment because they did not involve any inquiry into religious doctrine or practice).

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

NAJAM, J. and RILEY, J. concur.

STATE OF INDIANA	)	IN THE ST. JOSEPH
	) SS:	SUPERIOR COURT
COUNTY OF ST. JOSEPH	)	NO. 7
		CALENDAR TERM 2001
BEVERLY M. BRAZAUSKAS	)	CAUSE NO.
Plaintiff	)	71D07-9302-CP-10017
VS.	)	**ORDER**
FORT WAYNE-SOUTH BEND DIOCESE, INC., SACRED HEART PARISH and JOSE MARTELLI	)	
Defendants	)	

This matter is before the Court for ruling on the Defendants', Fort Wayne-South Bend Diocese, Inc., Sacred Heart Parish and Jose Martelli (collectively Defendants) Motion to Dismiss filed January 5, 2001, in which the Defendants sought dismissal of the Plaintiff's claims for tortuous inference with a prospective business relationship and blacklisting.

The Court held oral argument on the Motion on January 26, 2001 in the Marshall Circuit Court. The Plaintiff was represented by Stephen Terrell, and the defendants were represented by William T. Hopkins, Jr. and Michael A. Scheer. The issues argued were addressed earlier in these proceedings. Other issues have been addressed and removed from this litigation and after some guidance from the Indiana Court of Appeals, these issues are being revisited.

The Motion to Dismiss was taken under advisement. Having reviewed the arguments presented, together with the briefs and exhibits filed with the Court by Counsel for Defendants and Plaintiff, the record of these proceedings and being duly advised in the premises, the Court now finds that the defendants' Motion to Dismiss should be and hereby is **GRANTED**.

IT IS THEREFORE ORDERED that the Plaintiff's Claim for Tortious Interference with a Prospective Business Relationship and Blacklisting be and are hereby **DISMISSED** for the reason that this Court lacks subject matter jurisdiction to hear those claims. All claims that remained pending are thus resolved, and this case is fully and finally concluded.

ALL OF WHICH IS ORDERED this 7th day of February, 2001.

/s/ Michael D. Cook
MICHAEL D. COOK
SPECIAL JUDGE
ST. JOSEPH SUPERIOR
COURT NO. 7

FILED
FEB 4 - 2004
OFFICE OF THE CLERK

No. 03-952

IN THE

Supreme Court of the United States

BEVERLY M. BRAZAUSKAS,

Petitioner,

v.

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., SACRED HEART PARISH and JOSE MARTELLI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF IN OPPOSITION

WILLIAM T. HOPKINS, JR.
Counsel of Record
KAREN A. FESTA
BARNES & THORNBURG
600 One Summit Square
Fort Wayne, Indiana 46802
(260) 423-9440

Attorneys for Respondents

185571

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does the "church autonomy doctrine" defeat a claim under Indiana's former blacklisting statute against a church and its clergy, where the ex-employee's only evidence of alleged blacklisting were communications between clergy made pursuant to their obligations under a religious directive issued by the highest church authority, and where there is no evidence that those communications concerned her re-employment?

2. Under *Employment Div. v. Smith*, can an ex-employee impose liability under Indiana's former blacklisting statute on a church and its clergy for communications made to other church officials, where such communicative activity occurred pursuant to a religious directive that concerned matters of internal church governance?

LIST OF PARTIES

All of the parties to this proceeding are correctly listed in the Petition for a Writ of Certiorari, except that the correct name of the Respondent identified as "Fort Wayne-South Bend Diocese, Inc." is "Diocese of Fort Wayne-South Bend, Inc."

RULE 26.9 NOTATION

The Respondent, Diocese of Fort Wayne-South Bend, Inc., has no parent, and there are no publicly held companies that hold any stock of the Respondent.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Rule 26.9 Notation	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	2
1. Introduction	2
2. Facts	2
3. Procedural History	6
Reasons for Denying the Petition	9
1. No national or public interest will be served by review of this case because it involves the vindication of a state-created right under the former version of a state statute.	9

Contents

Page

2. The Indiana Supreme Court did not deviate from established precedent regarding church autonomy, and did not render a significant church autonomy decision, warranting review. 14

3. This case does not present compelling grounds for this Court to reexamine the hybrid exception because the Indiana Supreme Court's decision focused on church autonomy. 19

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Bartlett v. Stephenson, 535 U.S. 1301 (2002) 11, 12

Bridgestone/Firestone, Inc. v. Lockhart, 5 F. Supp. 2d 667 (S.D. Ind. 1997) 13

Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) 22

Bryce v. Episcopal Church, 289 F.3d 648 (10th Cir. 2002) 15, 16

Butts v. OCE-USA, Inc., 9 F. Supp. 2d 1007 (S.D. Ind. 1998) 13

Cantwell v. Connecticut, 310 U.S. 296 (1940) 17, 20

Combs v. Central Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999) 15

EEOC v. Catholic University of Amer., 83 F.3d 455 (D.C. Cir. 1996) 15, 22, 23

EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000) 15

Employment Division v. Smith, 494 U.S. 872 (1990) ..... *passim*

Cited Authorities

	Page
Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000)	15
Gonzales v. Roman Catholic Archbishop, 280 U.S. 1 (1929)	14
Hull v. Central Trans., Inc., 628 F. Supp. 784 (N.D. Ind. 1986)	13
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)	14
Kissinger v. Board of Trustees of Ohio St. University, 5 F.3d 177 (6th Cir. 1993)	22
Knight v. State of Conn., 275 F.3d 156 (2d Cir. 2001)	21
Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church, 363 U.S. 190 (1960)	14
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	11
Lucas v. Townsend, 486 U.S. 1301 (1988)	11-12
Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367 (1970)	15
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	20

Page

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 10, 11

Ross v. Moffitt, 417 U.S. 600 (1974) 13

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 14

Swanson v. Guthrie Independent Sch. District, 135 F.3d 694 (10th Cir. 1998) 21

Thomas v. Anchorage Equal Rights Com'n, 165 F.3d 692, *withdrawn, reh'g granted*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001) 21

Ticor Title Insurance Co. v. Brown, 511 U.S. 117 (1994) 11

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) ... 14

STATE CASES

Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc., 755 N.E.2d 201 (Ind. Ct. App. 2001) 6

Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc. ("Brazauskas"), 796 N.E.2d 286 (Ind. 2003) .. *passim*

Cited Authorities

Page

Burk v. Heritage Food Serv. Equipment, Inc., 737 N.E.2d 803 (Ind. Ct. App. 2000) 13

McKelvey v. Pierce, 800 A.2d 840 (N.J. 2002) 17

Wabash Railroad Co. v. Young, 162 Ind. 102, 69 N.E.2d 1003 (Ind. 1904) 13

DOCKETED CASES

Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc., No. 71D07-9302-CP-10017 (St. Joseph Super. Ct. Feb. 7, 2001) 6

UNITED STATES CONSTITUTION

U.S. Const. amend. I 6, 9, 22

STATE STATUTES

Ind. Code § 22-5-3-1 (1993) 4

Ind. Code § 22-5-3-2 (1993) 4

Ind. Code Ann. § 22-5-3-1(b) (West 2003) 1, 9

Page

RULE

Sup. Ct. R. 10 ..... 13, 20

MISCELLANEOUS

Am. Jur. 2d *Labor & Labor Relations* § 669 (2003) 12

Ex Corde Ecclesiae ..... *passim*

Validity, Construction, and Operation of State Blacklisting Statutes, 95 A.L.R.5th 1 (2004) ... 12

Respondents, the Diocese of Fort Wayne-South Bend, Inc., Sacred Heart Parish, and Jose Martelli, respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the Supreme Court of Indiana's opinion in this case.

STATEMENT OF JURISDICTION

Petitioner's statement regarding jurisdiction is correct except that the Indiana Supreme Court's opinion did not "affirm[] dismissal of Petitioner's claim." Rather, the Indiana Supreme Court reversed the dismissal of the case for lack of subject matter jurisdiction and remanded it to the trial court for entry of summary judgment in the Respondents' favor.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents include the following 1995 revision to the Indiana blacklisting statute in addition to the constitutional and statutory provisions cited by Petitioner:

> An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made.

IND. CODE ANN. § 22-5-3-1(b) (West 2003).

STATEMENT OF THE CASE

1. Introduction

The issue in this case arises under a version of the Indiana blacklisting statute in effect prior to 1995. Petitioner Beverly Brazauskas ("Brazauskas") seeks reinstatement of her blacklisting claim against the Respondents Diocese of Fort Wayne-South Bend, Inc. ("Diocese"), Sacred Heart Parish ("Sacred Heart"), and Father Jose Martelli ("Fr. Martelli"). Brazauskas has petitioned this Court for a writ of *certiorari* to the Indiana Supreme Court, which ordered the case remanded for entry of summary judgment in favor of the Diocese, Sacred Heart, and Fr. Martelli.

2. Facts

Sacred Heart, which is part of the Diocese, is located on the campus of the University of Notre Dame ("Notre Dame") near South Bend, Indiana. In 1992, Brazauskas was employed by Sacred Heart as the Director of Religious Education and Liturgy. In August 1992, Fr. Martelli, who was the Parish Pastor and Brazauskas' supervisor, dismissed her from her position because he had serious concerns about how she performed her pastoral duties.

In October, 1992, the Assistant Chair of the Notre Dame Theology Department and a supporter of Brazauskas, Dr. Kern Trembath ("Trembath"), sent a letter to Fr. Martelli regarding Brazauskas' termination. In the letter, Trembath accused Fr. Martelli of scandalizing the Catholic Church by firing its employees. He indicated that "the fact that you are allowed to remain a priest is simply and strictly a measure of the worldwide shortage of priests." (Appendix to Petition

for a Writ of Certiorari, page 8 ("Pet. App. 8")). He described Fr. Martelli as "a bad priest, and . . . not a cultural American." (*Id.*) Trembath's letter was followed by a second letter in October 1992 from Trembath and his wife accusing Fr. Martelli of lying, and threatening litigation unless, among other things, he resolved Brazauskas' issues against him to the satisfaction of Brazauskas and her attorney. (*Id.*).

In November 1992, Fr. Martelli wrote to Notre Dame's President, Father Edward Malloy ("Fr. Malloy"). He enclosed copies of the Trembaths' letters, indicating that they "include charges and accusations so alarming in nature that I would be remiss not to bring them to your attention." (Pet. App. 8). Fr. Martelli mentioned Brazauskas only as the reason for the Trembaths' letters. He did not criticize her or her actions. (*Id.*). Fr. Martelli indicated that "I send these documents to you for your information and not with the intent of causing more trouble for anyone." (*Id.*).

In February 1993, Brazauskas sued the Diocese, Sacred Heart and Fr. Martelli (collectively, "Diocese defendants") over her termination alleging a variety of state law claims. All of her claims were eventually dismissed in various state court proceedings. While her lawsuit was pending, Brazauskas applied for a position at Notre Dame as the Acting Director of the Program for Church Leaders ("PCL"), a sabbatical program for persons in the religious ministry. In June 1993, a Notre Dame search committee recommended Brazauskas for the PCL job to Fr. Malloy.

Fr. Malloy indicated that he was unaware that the PCL program was still in existence and that he thought the program had been dissolved. (Pet. App. 3 n.1, 20). He also testified that it was his belief that Notre Dame "should not hire

someone who is in an active lawsuit against the local bishop until that matter [is] resolved." (Pet. App. 2). He stated that "I consider a [C]atholic university to desirably have a positive and respectful relationship to the [C]atholic church community, including the local bishop," and hiring someone bringing a pending lawsuit "would be a gesture of ill will until such a matter was resolved by the courts." (Pet. App. 2-3). The PCL program was subsequently eliminated. (Pet. App. 3 n.1, 20).

After Brazauskas learned that she had not received the Notre Dame PCL job in the summer of 1993, she added claims to her lawsuit against the Diocese defendants for blacklisting, pursuant to a pre-1995 version of Indiana's blacklisting statute, and for tortious interference with a business relationship.[1]

The Indiana blacklisting statute prohibited a "person" from "preventing" a former employee from obtaining employment with "any other person" or attempting to do so. IND. CODE §§ 22-5-3-1, 22-5-3-2 (1993); (Petition for a Writ of Certiorari, page 3 ("Pet. 3")). Brazauskas claimed that the Diocese defendants made communications to Notre Dame that unlawfully prevented her from getting the PCL job. Brazauskas produced no evidence that Diocese and Notre

1. Brazauskas added her tortious interference claim in August 1993, and blacklisting in September 1995. (Pet. App. 21). The Indiana Supreme Court held that the former was more accurately "tortious interference with prospective advantage," an element of which was "independent illegal action." *Brazauskas*, 796 N.E.2d at 289 n.2, 291 (citation omitted) (Pet. App. 3 n.2, 7). Since blacklisting was the only illegal action Brazauskas alleged, her ability to assert a tortious interference claim would depend on her ability to sustain a blacklisting claim. *Id.* at 291 (citation omitted) (Pet. App. 7).

Dame officials communicated about the PCL position or her candidacy for it. (Pet. App. 9). Instead, Brazauskas claimed that blacklisting could be inferred from Fr. Martelli's correspondence to Fr. Malloy enclosing the Trembaths' letters, phone records showing calls from the office of the Bishop of the Diocese, John M. D'Arcy ("Bishop D'Arcy") to Notre Dame officials during the weeks of Brazauskas' candidacy for the PCL job, and Notre Dame's cancellation of the PCL program. (Pet. App. 8-9, 26-27).

The relationship and communications between a Catholic Diocese and a Catholic university located within that Diocese are governed by a religious directive that Pope John Paul II issued in 1991. That directive, entitled *Ex Corde Ecclesiae*,[2] is based on Catholic Church Canon Law. *Ex Corde Ecclesiae* calls for "close personal and pastoral relationships . . . between universities and Church authorities characterized by mutual trust, close and consistent cooperation and continuing dialogue." *Ex Corde Ecclesiae* at 20 (Pet. App. 3, 27-28). *Ex Corde Ecclesiae* requires that Catholic universities "be in close communion with the local Church . . . and in particular" with the local Bishop. *Id.* at 33-34 (Pet. App. 28). It also requires that the local Bishop "promote the welfare of the Catholic universities in his diocese" and "watch over the preservation and strengthening of their Catholic character." *Id.* (Pet. App. 28). *Ex Corde Ecclesiae* requires a Catholic university to appoint persons "to provide pastoral ministry for the university community, carried on in harmony and cooperation with the pastoral activities of the local Church *under the guidance or with the approval of the diocesan bishop*." *Id.* at 34-35 (emphasis added) (Pet. App. 28).

---

2. POPE JOHN PAUL II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE OF THE SUPREME PONTIFF (St. Paul Books & Media 1991).

3. Procedural History

In the Indiana courts, the Diocese defendants argued that the conduct which formed the basis of Brazauskas' blacklisting claim occurred pursuant to Fr. Martelli's and Bishop D'Arcy's obligations under, and efforts to comply with, religious law, *i.e.*, *Ex Corde Ecclesiae.* Therefore, the First Amendment to the United States Constitution precluded secular court review of that conduct under Indiana's blacklisting law. U.S. CONST. amend. I. The trial court granted the Diocese defendants' motion to dismiss for lack of subject matter jurisdiction. *Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc.*, No. 71D07-9302-CP-10017 (St. Joseph Super. Ct. Feb. 7, 2001) (Pet. App. 32). The Indiana Court of Appeals affirmed the trial court, concluding that because the Diocese defendants' actions had a doctrinal basis, a secular court could not review those actions. *Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc.*, 755 N.E.2d 201, 208 (Ind. Ct. App. 2001) (Pet. App. 19, 31).

Brazauskas appealed to the Indiana Supreme Court. That court reversed the dismissal of the case for lack of subject matter jurisdiction, concluding that secular courts could review religious directives for limited purposes; however, the court ultimately found in favor of the Diocese defendants. *Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc.* (*"Brazauskas"*), 796 N.E.2d 286, 292-93 (Ind. 2003) (citation omitted) (Pet. App. 1, 10-11). It remanded the case for entry of summary judgment in their favor. *Brazauskas*, 796 N.E.2d at 294 (Pet. App. 14).

In rendering its decision, the Indiana Supreme Court applied and interpreted the version of the Indiana blacklisting statute in effect when Brazauskas' claim arose in 1993.

Id. at 290-91 (Pet. App. 6-7). The court found that Brazauskas based "her claim primarily on a letter Father Martelli wrote more than six months before she applied for the PCL job, and on influence allegedly exerted by the Bishop that prompted Father Malloy to deny Brazauskas the position." *Id.* at 291 (Pet. App. 8). As to Fr. Martelli's letter, the Court found Brazauskas failed to explain "how such a letter could support a reasonable inference that by making others aware of Trembath's accusations Father Martelli prevented her from getting the PCL position." *Id.* at 292 (Pet. App. 9). The court found that Brazauskas' allegations against the Bishop were "on similarly shaky factual ground[,]" observing that "[b]oth Bishop D'Arcy and Father Malloy deny that they ever discussed the PCL position, much less Brazauskas' candidacy." *Id.* (Pet. App. 9). The court found that Brazauskas' evidence, such as records of phone calls from the Bishop to Notre Dame officials was "at most marginally sufficient to raise a genuine issue of material fact. . . ." *Id.* (Pet. App. 9).

The Indiana Supreme Court found that besides the weakness of Brazauskas' evidence, religious motivation behind Bishop D'Arcy's and Fr. Martelli's actions precluded statutory blacklisting liability under the facts of the case. It found that *Ex Corde Ecclesiae* established

> that higher church authority (namely, the Pope) has directed Catholic universities such as Notre Dame and local Catholic diocese officials to cooperate closely, communicate, and develop an environment of mutual trust. Bishop D'Arcy and other diocesan personnel would therefore be acting in accordance with ecclesiastical directive in keeping Father Malloy apprised of diocesan

> developments, including pending lawsuits, and in coordinating with him on administrative and policy matters.

Id. at 293 (Pet. App. 11). The court concluded that under the facts of the case, the Free Exercise Clause entitled the Diocese defendants to Summary Judgment on Brazauskas' blacklisting and tortious interference claims:

> Brazauskas would have us apply the blacklisting statute and tort law to penalize communication and coordination among church officials (all answerable to higher church authority that has directed them to work cooperatively) on a matter of internal church policy and administration *that did not culminate in any illegal act.* Such a holding would violate the church autonomy doctrine and run counter to the Court's declaration in *Cantwell v. Connecticut*, 310 U.S. 296, 307 . . . (1940): "the fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged."

Id. at 294 (footnote omitted) (emphasis added) (Pet. App. 13).

REASONS FOR DENYING THE PETITION

1. No national or public interest will be served by review of this case because it involves the vindication of a state-created right under the former version of a state statute.

Brazauskas' claim against the Diocese defendants relies solely on state law. She has not asserted any violation of her federal constitutional rights, only her right not to be "blacklisted" under the Indiana blacklisting statute. The manner in which a federal constitutional issue is implicated is in the defense of Brazauskas' claim—the Indiana Supreme Court interpreted Indiana's blacklisting statute to preclude her claim because of First Amendment restrictions.

Additionally, Brazauskas asserted her claim under a former version of the Indiana blacklisting statute. As the Indiana Supreme Court observed, Indiana's blacklisting statute in 1993 read almost the same as it did at its initial enactment in 1889. *Brazauskas*, 796 N.E.2d at 290 (Pet. App. 6). In 1995, the Indiana legislature added the following exception:

> An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made.

Id. at 291 (quoting IND. CODE ANN. § 22-5-3-1(b) (West 2002)) (Pet. App. 7). The Indiana Supreme Court found: "Brazauskas

does not claim that any of the alleged disclosures that led to her denial of the PCL position were false. She would therefore have no claim for blacklisting under the revised statute" and there would be "no need to reach the Diocese defendants' constitutional argument." *Brazauskas*, 796 N.E.2d at 291 (citations omitted) (Pet. App. 7).

This Court has dismissed a writ of *certiorari* when the issue the case presented was not important to the public or likely to recur. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), this Court initially granted *certiorari* to consider the petitioner's claim that a cemetery violated her constitutional rights by refusing to bury her husband pursuant to a contract which prohibited burial of non-Caucasians. After granting certiorari, this Court learned that the State of Iowa had passed a subsequent statute that voided such contracts. This court held:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Rice, 349 U.S. at 74 (citations omitted). Citing former Supreme Court Rule 19, this Court held: "'Special and important reasons' imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the court's duty to avoid a decision of constitutional issues unless avoidance becomes evasion." *Id.* (citation omitted). This Court found that had the

subsequent Iowa statute been properly brought to its attention, the case would have assumed "an isolated significance[,]" and concluded that "in the absence of compelling reason" the Court should not dispose of a case "when time may further illumine or completely outmode the issues in dispute." *Id.* at 77. Quoting its decision in *Layne & Bowler Corp. v. Western Well Works, Inc.*, this Court held:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Rice, 349 U.S. at 79 (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

Similarly, in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994), this Court observed that "our resolution of the posited constitutional question may be quite unnecessary in law, and of virtually no practical consequence in fact, except with respect to these particular litigants[,]" and that "[e]ven if the constitutional question presented is hypothetical as to everyone else, it would seem to be a great practical importance to these litigants. But that is ordinarily not sufficient reason for our granting *certiorari* . . . ." *Ticor*, 511 U.S. at 121-22. In *Bartlett v. Stephenson*, 535 U.S. 1301 (2002), this Court observed that no reasonable probability existed that four Members of the Court would vote to grant *certiorari* "to resolve what is largely a dispute about the meaning of a single DOJ letter from 1981." *Bartlett*, 535 U.S. at 1304 (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304

(1988) (Kennedy, J., in chambers)). The Court concluded that the issue "which has few if any ramifications beyond the instant case, does not satisfy any of the criteria for the exercise of this court's discretionary jurisdiction. See this Court's Rule 10." *Bartlett*, 535 U.S. at 1304.

Review of the issues Brazauskas raises will have few, if any, ramifications beyond this case in light of the 1995 amendment. This case does not involve a declaration that a law of broad application is unconstitutional under the First Amendment, or vindication of religious institutions' free exercise rights in a far-reaching manner. Rather, this is a state law employment case, brought under the pre-1995 Indiana blacklisting statute, the interpretation of which was the proper province of the Indiana Supreme Court. To the extent the Free Exercise Clause was invoked, the Indiana Supreme Court relied on it to curtail the statute's applicability to the Diocese defendants under the particular facts. The pre-1995 Indiana blacklisting statute did not have a broad application. It was unique to Indiana.[3] Furthermore, that version of the statute is no longer in effect. As the Indiana Supreme Court noted, Brazauskas would have no claim under the 1995 amendment, and it would be unnecessary to address the Diocese defendants' constitutional argument. Therefore, the issues raised by this case are unlikely to recur.[4]

---

3. Twenty-five states have laws dealing with "blacklisting" and those vary greatly from state to state. *See* 48 AM. JUR. 2D *Labor & Labor Relations* § 669 (2003), *see also* Edward M. Cramp, Annotation, *Validity, Construction, and Operation of State Blacklisting Statutes*, 95 A.L.R. 5th 1 (2004).

4. No other cases appear to address Indiana blacklisting claims against religious organizations. The statute in general is not frequently

(Cont'd)

Finally, the Indiana Supreme Court did not engage in an expansive application of the Free Exercise Clause to the blacklisting statute. It specifically limited its holding to the facts of Brazauskas' case. *Brazauskas* 796 N.E.2d at 293-94 (Pet. App. 13-14). Review of this case will therefore result in this Court reexamining those facts and the former Indiana blacklisting statute—issues which will have little effect beyond this case and which will not constitute a constructive use of this Court's time and resources. The issues this case raises, while important to the particular litigants, are not of public importance warranting this Court's review.

Even assuming *arguendo* that the Indiana Supreme Court's reasoning was wrong, reversal of it will only correct a state court's mistaken application of established constitutional doctrines to a former state law. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. This Court has indicated that it is not a tribunal of errors that sits to correct every error of a lower court: "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review," *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

(Cont'd)

litigated. In considering a claim in 2000, the Indiana Court of Appeals observed that no Indiana state court had "addressed any claim under the Blacklisting statute since our supreme court in 1904." *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803 (Ind. Ct. App. 2000). Only a few Indiana state or federal courts have ruled on the merits of such claims: *See* pre-1995 claims: *Hull v. Central Trans., Inc.*, 628 F. Supp. 784 (N.D. Ind. 1986); *Wabash Railroad Co. v. Young*, 162 Ind. 102, 69 N.E.2d 1003 (Ind. 1904). *See* post-1995 claims: *Butts v. OCE-USA, Inc.*, 9 F. Supp. 2d 1007 (S.D. Ind. 1998); *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667 (S.D. Ind. 1997).

For the reasons above, this case does not implicate the type of far-reaching constitutional issues that necessitate this Court's review.

2. The Indiana Supreme Court did not deviate from established precedent regarding church autonomy, and did not render a significant church autonomy decision, warranting review.

The Indiana Supreme Court's application of the church autonomy doctrine to Brazauskas' blacklisting claim was not a radical departure from or expansion of that doctrine. Rather, the Indiana Supreme Court's application was consistent with this Court's decisions establishing religious organizations' freedom to manage internal, ecclesiastical matters. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) (". . . whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them. . . ."); *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical . . . are accepted in litigation before the secular courts as conclusive. . . ."); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (holding that religious organizations have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."); *Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church*, 363 U.S. 190, 191 (1960) (companion case to *Kedroff;* held that neither state legislature, nor state judiciary could interfere in matters of church government, faith, and doctrine); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976)

(civil courts deciding "religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.") (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

The Indiana Supreme Court's decision was also consistent with the federal circuit courts, which have relied on church autonomy in recent cases. The Tenth Circuit's decision in *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002) provided a thorough discussion of the church autonomy doctrine. *Bryce* involved a suit by two ministers for sexual harassment against the Episcopal Church after it terminated one of them for having a homosexual relationship with the other. As evidence of the harassment, the ministers relied on communications by Church leaders, to parishioners and each other, regarding homosexuality and the ministers' relationship. Citing this Court's line of decisions, and a variety of circuit court decisions, the *Bryce* court first concluded that the church autonomy doctrine remained viable after the decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). It found that the post-*Smith* circuit court cases relied "on a long line of Supreme Court cases affirming the church autonomy doctrine . . . . These [circuit court] cases' rationale extends beyond the specific ministerial exception to the church autonomy doctrine generally, and we therefore find that the church autonomy doctrine remains viable after *Smith*." *Bryce* 289 F.3d at 656-57 (citing *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 n.* (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 348-50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Amer.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996)).

The *Bryce* court then observed that "the church autonomy doctrine is not without limits," and that churches are still liable for tort or contract violations arising from conduct that has no religious motivation. *Id.* at 657 (citations omitted). Relying on this Court's decision in *Wisconsin v. Yoder*, the Tenth Circuit observed that the "threshold inquiry is whether the alleged misconduct is 'rooted in religious belief.'" *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The court concluded that the allegedly harassing conduct of the church officials was "rooted in religious belief" because it consisted of communications between Church leaders, and Church leaders and parishioners, on a matter of Church governance and doctrine, specifically, Church law concerning marriage and homosexuality. *Bryce*, 289 F.3d at 658. The court held:

> The church autonomy doctrine is rooted in protection of the First Amendment rights of the church to discuss church doctrine and policy freely. The applicability of the doctrine does not focus upon the relationship between the church and [plaintiff]. It focuses instead on the right of the church to engage freely in ecclesiastical discussions with members and non-members.

Id.

The Indiana Supreme Court's application of the church autonomy doctrine to the blacklisting statute was consistent with the precedents of this Court and the circuit courts. The Indiana court correctly recognized that churches have been held free from interference in matters of internal governance under such precedents. Also, consistent with precedent, the Indiana court assessed whether the alleged blacklisting conduct was "rooted in religious belief," by

finding sufficient facts showing that Bishop D'Arcy's and Fr. Martelli's communications and conduct were religiously motivated under *Ex Corde Ecclesiae*, which embodied a matter of internal church governance—the Canon Law controlling the relationship between a Catholic diocese and local Catholic university. The Indiana Supreme Court properly concluded that liability for blacklisting could not be imposed on the Diocese defendants for such religiously motivated conduct, particularly where no direct evidence of unlawful secular conduct was shown. This reasoning is consistent with the above cases describing and applying the church autonomy doctrine. It is also consistent with this Court's decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which overturned a person's conviction for breach of the peace where the only conduct shown was the protected communication of religious views and no unlawful secular conduct—such as threats, abuse, or profanity—was established.

The Indiana Supreme Court's application of the church autonomy doctrine was not overly broad or expansive. The Indiana court did not hold that *Ex Corde Ecclesiae* immunized the Diocese defendants against every legal claim. To the contrary, consistent with the above precedents, it limited its decision to the facts of Brazauskas' case. *Brazauskas*, 796 N.E.2d at 293-94 (Pet. App. 13-14). Quoting the New Jersey Supreme Court, the Indiana Supreme Court held that: "'The First Amendment does not immunize every legal claim against a religious institution and its members. The analysis in each case is fact-sensitive and claim specific, requiring an assessment of every issue raised in terms of doctrinal and administrative intrusion and entanglement.'" *Id.* (quoting *McKelvey v. Pierce*, 800 A.2d 840, 844 (N.J. 2002)) (Pet. App. 13-14). As an example, the court

observed that the Free Exercise Clause would not prevent prosecution for an agreement to commit a felony "even if that other person is another church member or official and the agreement implicates ecclesiastical issues, if the state also proves an overt act in furtherance of that agreement in accordance with Indiana's conspiracy statute." *Brazauskas*, 796 N.E.2d 294 n.6 (citation omitted) (Pet. App. 13 n.6).

The Indiana Supreme Court's decision was consistent with the existence, application, and limitations of the church autonomy doctrine. It was not a radical departure from, or expansion of, what this Court, or other courts, have held. Furthermore, The Indiana Supreme Court's decision was not a significant church autonomy decision that would render this case one of public importance. As discussed above, church autonomy arose as a defense to Brazauskas' state law blacklisting claim, and the Indiana Supreme Court limited the doctrine's application to that claim only, under the particular facts of the case. Therefore, the decision's impact was limited to how church autonomy affected factually-similar blacklisting claims in Indiana, and would have no effect on federal or other state jurisdictions. Furthermore, it would have little or no impact on Indiana blacklisting claims because the version of the statute in question is no longer in effect. This case is simply not a seminal church autonomy decision that warrants this Court's review.

3. This case does not present compelling grounds for this Court to reexamine the hybrid exception because the Indiana Supreme Court's decision focused on church autonomy.

This case is not a significant decision concerning "hybrid situations" discussed in *Employment Div. v. Smith*, 494 U.S. 872 (1990):

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press. . . .
>
> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.

Smith, 494 U.S. at 881-82 (citations omitted) (footnote omitted). The Indiana Supreme Court did quote from *Smith* in discussing how the facts of Brazauskas' case were distinguishable from the facts in *Smith*; however, its decision ultimately focused on church autonomy.

The Indiana Supreme Court observed: "There is an important and relevant limitation in the *Smith* decision. Justice Scalia specifically noted that the case presented 'a free exercise claim unconnected with any communicative activity.' *Id.* at 882. . . . Here, in contrast, the challenged activity was communicative." *Brazauskas*, 796 N.E.2d at 293

(footnote omitted) (Pet. App. 11). Beyond mentioning this distinguishing factor, the Indiana Supreme Court issued no decision concerning the hybrid exception's existence or application. The remainder of the court's decision discussed the church autonomy doctrine, concluding that "the Free Exercise Clause entitles the defendants to summary judgment. . . ." *Id.* at 293-94 (Pet. App. 12-14). One comment regarding "communicative activity" does not render the Indiana Supreme Court's decision a compelling hybrid case under Supreme Court Rule 10. Review of the court's decision will not substantially impact cases that do directly address the hybrid exception.

To the extent the Indiana Supreme Court relied on *Smith*'s statement concerning "hybrid situations," its decision was correct. The court accurately observed, pursuant to *Smith*, that Brazauskas' case against the Diocese defendants involved communicative activity between Church officials, making it factually different from situations in which individuals sought to engage in illegal conduct as a religious practice. This conclusion comports with the language in *Smith* describing "hybrid situations." While the Indiana court therefore correctly applied *Smith*'s language, it also correctly concluded that church autonomy issues, outside of the *Smith* decision, predominated: "*Smith* is distinguishable in another important respect, because it did not implicate the church autonomy doctrine." *Id.* at 293 (Pet. App. 12). Even the cases that *Smith* cited as examples of hybrid situations involving "communicative activity" did not concern communications relating to the internal governance of a religious organization. *Smith*, 494 U.S. at 881 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (communicative activity consisted of religious solicitations by individuals); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (communicative activity consisted of dissemination of religious ideas)).

Because this case involved communications between church officials relating to a matter of internal church governance, the Indiana Supreme Court correctly recognized that it posed issues other than those discussed in *Smith*, leading the court to focus on the church autonomy doctrine rather than the hybrid exception. Therefore, these distinguishing issues render this case inappropriate as a prototype for clarification of the hybrid exception, or for resolving any alleged discrepancy between the circuits' application of the exception. This point is further illustrated by the difference between this case, and the circuit court cases dealing with the hybrid exception that Brazauskas cites in her Petition. Not only is the Indiana Supreme Court's decision not in conflict with those cases, it is simply inapposite to them. They did not involve church officials communicating on matters of internal church governance, faith, or doctrine. Instead, they involved individuals who were asserting free exercise claims and coupling them with other constitutional claims. The courts considered the application of the hybrid exception in light of those other constitutional claims. *See Knight v. State of Conn.*, 275 F.3d 156, 166-67 (2d Cir. 2001) (state agency employees disciplined for evangelizing to agency clients failed to state free speech hybrid claim because different legal test applied to public employees); *Thomas v. Anchorage Equal Rights Com'n*, 165 F.3d 692, *withdrawn*, *reh'g granted*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001) (rental property owners' Fifth Amendment "takings" claims, protesting ordinance requiring rentals to unmarried couples, constituted "hybrid claims" under "colorable claim" approach; however, opinion was withdrawn, and later *en banc* opinion held case not ripe for review); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998) (rejected claim by home-schooled

student's parents that refusal to let student attend public school part time violated free exercise/right to control child's education; held that a hybrid claim: "at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right. . . ."); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) (rejected claim by students' parents against school for requiring students' attendance at sexually explicit AIDS awareness program because free exercise not "conjoined with an independently protected constitutional protection."); *Kissinger v. Bd. of Trustees of Ohio St. Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (rejecting the hybrid exception in case brought by veterinary student demanding that she be excused from a required course on several constitutional grounds).

In this case, the Diocese defendants neither asserted a free exercise claim or a companion "hybrid" claim; they raised the First Amendment only as a defense to Brazauskas' state law claims—a defense based on notions of church autonomy. This case therefore involves different issues from the cases Brazauskas cites. It does not relate to those cases and is not an appropriate case for resolving any alleged discrepancies among their interpretations of the hybrid exception.

The only case Brazauskas cites which relates to the Indiana Supreme Court's decision is *EEOC v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996), because it involved a religious organization defending itself against a sex discrimination claim. The D.C. Circuit rejected the EEOC's and plaintiff's claim, based primarily on the university's First Amendment defense under the ministerial exception/church autonomy

doctrine. *Catholic Univ*, 83 F.3d at 462-66. The D.C. Circuit held secondarily that, absent ministerial exception grounds, the university would have a defense that the case was a "hybrid situation" described in *Smith* because it involved both free exercise and excessive entanglement issues. *Id.* at 467. This conclusion was consistent with *Smith*'s discussion of what constituted a hybrid situation. The Indiana Supreme Court's decision is not in conflict with *Catholic University's* holding; rather, it is consistent. The court focused on the church autonomy doctrine as the primary issue, but also noticed the presence of "communicative activity" as another distinguishing factor under *Smith*. Because the Indiana Supreme Court's decision properly focused on church autonomy, it is not a seminal hybrid case of public importance that would warrant this Court's reexamining the hybrid exception.

Even assuming *arguendo* that the Indiana Supreme Court's statement regarding "communicative activity" was wrong, reversal will have no effect, because the court relied on the church autonomy doctrine as other grounds for its decision. Even if the Indiana court's decision was reversed in its entirety, its effect would be limited to reinstating Brazauskas' state law blacklisting claim under a former version of Indiana's blacklisting statute. As discussed above, this result will not have far reaching effects, even in Indiana. Therefore, this case does not merit review.

CONCLUSION

For the reasons above, Brazauskas' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM T. HOPKINS, JR.
Counsel of Record
KAREN A. FESTA
BARNES & THORNBURG
600 One Summit Square
Fort Wayne, Indiana 46802
(260) 423-9440

Attorneys for Respondents

MAR 5 - PAGE 1

(3)

No. 03-952

Supreme Court U.S.
FILED
FEB 18 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BEVERLY M. BRAZAUSKAS,

Petitioner,

v.

FORT WAYNE-SOUTH BEND DIOCESE, INC. SACRED HEART PARISH, AND JOSE MARTELLI,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Indiana

PETITIONER'S REPLY BRIEF

STEPHEN M. TERRELL
LANDMAN & BEATTY
1150 Market Square Center
151 North Delaware Street
Post Office Box 44953
Indianapolis, IN 46244-0953
(317) 236-1040

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITIONER'S REPLY BRIEF

By narrowly defining the issues as nothing more than interpretation of a now-amended statute, Respondents have attempted to shift the focus of this case away from the important constitutional issues presented. But this attempt at legal argument by misdirection is as apparent as it is misguided.

The question before this Court is not the narrow construction of a since-amended Indiana statute. Rather it is the fundamental relationship established in the First Amendment between Church and State, and expounded upon by this Court in *Employment Division v. Smith*[1] and in the church autonomy doctrine.

Petitioner Beverly Brazauskas was permitted by Indiana law to obtain redress for violation of Indiana's Blacklisting Statute.[2] A misinterpretation of the First Amendment prevented that lawsuit from going forward. That misinterpretation was due to the ongoing confusion among various federal and state courts as to the interpretation of *Employment Division v. Smith* and application of the church autonomy doctrine.

The 1995 amendment of Indiana's Blacklisting Statute[3] in no way abrogates the constitutional issues raised in this petition. The amendment did not change the general applicability of the statute. The issue before this Court is

---

[1] 494 U.S. 872 (1990)

[2] Ind. Code 22-5-3-1, -2 (West 1993).

[3] The amendment to the Indiana statute provided employers with an additional defense of truth to claims brought under Section 1 of the Indiana Blacklisting Statute. *See.* Ind. Code 22-5-3-1(b) (West 2003).

whether a defendant's status as a religious organization grants it immunity from neutral laws of general applicability where non-religious entities would be held liable for the same conduct. This determination has application far beyond the parties to this litigation and the context of a blacklisting statute. Indeed, it impacts every statutory regulation of conduct, and whether religious entities must comply with such proscriptions.

Respondents also maintain that blacklisting cases are rare, and therefore this case does not warrant the Court's attention. But interpretation of Indiana's blacklisting law is not the issue presented to this Court. This Court did not grant certiorari in *Employment Division v. Smith* because ingestion of peyote had risen to the top of the nation's priorities in the war on drugs. Certiorari was granted because the case raised fundamental issues regarding the relationship between religious acts and neutral laws of general applicability. The same is true here.

The confusion caused by divergent interpretations of the hybrid exception under *Employment Division v. Smith* is of significant importance and requires the attention of this Court. Likewise, of equal importance is determining the application of the church autonomy doctrine where it has been used to exempt religious entities from liability for otherwise prohibited conduct.

The Petition for Certiorari should be granted.

Respectfully submitted,

STEPHEN M. TERRELL
LANDMAN & BEATTY
1150 Market Square Center
151 N. Delaware Street
Indianapolis, IN 46204